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7 Otto 24
Oct. 7. 1877

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 277.

THE BOSTON BEER COMPANY, CLAIMANT OF CERTAIN INTOXICATING LIQUORS, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE ~~CIRCUIT~~ Supreme COURT OF THE ~~UNITED STATES FOR THE~~ Commonwealth DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 21, 1875.

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a COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior court for the transaction of criminal business.

COMMONWEALTH
v.
CERTAIN INTOXICATING LIQOURS, BOSTON Beer Company, claimant.

BOSTON BEER COMPANY, CLAIMANT, PLAINTIFF in error,
v.
COMMONWEALTH OF MASSACHUSETTS, DEfendant in error.

Writ of error with return of superior court thereon.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the superior court of the commonwealth of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit between the commonwealth of Massachusetts, plaintiff, and certain intoxicating liquors, claimant, Boston Beer Company, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Contsitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error has happened, to the great damage of the said Boston Beer Company, claimant, as by its complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hono able Morrison R. Waite, Chief Justice of the said Supreme Court, this 14th day of December, in the year of our Lord one thousand eight hundred and seventy-four.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States.

Allowed by—

NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

2 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior court for the transaction of criminal business, March term, A. D. 1875.

And now the justices of the superior court of the commonwealth of Massachusetts make return of this writ by annexing hereto and returning herewith a true copy of the process and of all the proceedings in the case of the Commonwealth vs. Certain Intoxicating Liquors, Boston Beer Company, claimants, in the said superior court determined.

By the court.

Witness my hand and the seal of said superior court, at Boston, in said county, this twenty-fifth day of March, in the year of our Lord one thousand eight hunddred and seventy-five.

[SEAL.] JOHN P. MANNING, *Clerk.*

3 The United States of America to the Commonwealth of Massachusetts, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the superior court of the commonwealth of Massachusetts, wherein Boston Beer Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Clifford, justice of the Supreme Court of the United States, this 19th day of December, in the year of our Lord one thousand eight hundred and seventy-four.

NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

The Commonwealth of Massachusetts acknowledges due service of the above citation.

Dec. 29, 1874.

WILLIAM G. COLBURN,
Ass't Att'y General.

4 *Bond on writ of error.*

Know all men by these presents that we, the Boston Beer Company, a corporation established under the laws of Massachusetts, as principal, and Dennis H. Tully and F O. Prince, both of Boston, in said Massachusetts, as sureties, are held and firmly bound unto the Commonwealth of Massachusetts in the full and just sum of five hundred dollars, to be paid to the said Commonwealth or its certain attorney, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated the seventeenth day of December, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas lately, at a term of the superior court of the commonwealth of Massachusetts, begun and holding at Boston, within and for the county of Suffolk, in a suit depending in said court between said Commonwealth and certain intoxicating liquors, the said Boston Beer Com-

pany claimant, judgment was rendered against the said Boston Beer Company, and the said company having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Commonwealth, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that, if the said company shall prosecute its said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

BOSTON BEER COMPANY,
By DENNIS H. TULLY, *Treas.* [L. S.]
DENNIS H. TULLY. [L. S]
F. O. PRINCE. [L. S.]

Signed, sealed, and delivered in presence of—

Dec. 19, 1874, approved.

NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:

JOHN G. STETSON,
Clerk U. S. C. C. Mass. Dist.

5 I am satisfied with the sureties on the within bond.

(Signed) CHAS. R. TRAIN,
Attorney-General of Massachusetts.

6 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, to wit:

At the superior court begun and holden at the city of Boston, within and for the county of Suffolk, for the transaction of criminal business, on the first Monday of June, in the year of our Lord one thousand eight hundred and seventy-four, the honorable P. Emory Aldrich, a justice of said court, presiding—

7 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To the justices of the municipal court of the city, town, of Boston, holden at said Boston for the transaction of criminal business within and for said county:

John Green and John S. Tobey, both of Boston, in said county of Suffolk, and both being of full age, and competent to testify, in behalf of the commonwealth of Massachusetts, on oath, complain that they have reason to believe, and do believe, that intoxicating liquor, to wit, a certain quantity of whiskey, being about and not exceeding fifty gallons, in one-half barrel, four jugs; and a certain quantity of rum, being about and not exceeding three gallons, in one jug; and a certain quantity of gin, being about and not exceeding one gallon, in one jug; and a certain

quantity of ale, being about and not exceeding one hundred and twenty gallons in four barrels, on the nineteenth day of May, in the year of our Lord one thousand eight hundred and seventy-three, were, and still are, deposited by Patrick O'Connell, of said Boston, in a certain vehicle, to wit, a certain four-wheeled one-horse wagon, driven by said O'Connell, in said Boston, in said county; said liquors deposited and being conveyed as aforesaid to another person other than the said O'Connell, whose name to said complainants is now unknown, and said unknown person intending to sell said liquor in violation of the 415th chapter of the statutes of the year of our Lord eighteen hundred and sixty-nine of said commonwealth; and said liquors has been sold in said commonwealth in violation of said chapter, and the said complain'ts then and there having reasonable cause to believe that the said liquor has been so illegally sold, and is so intended for illegal sale as aforesaid, in said commonwealth, against the peace of the commonwealth and the form of the statute in such case made and provided; and said complainants pray for a warrant to search said vehicle, described as aforesaid, for said liquor, and that the same may be declared to be forfeited, and that said O'Connell, and all other persons claiming an interest in said liquors, may be summoned to appear before said municipal court, or some other court having jurisdiction of the case, to show cause, if any they have, why said liquors should not be declared forfeited.

JOHN GREEN,
JOHN S. TOBEY.

Received and sworn to at said Boston, before said court, this twentieth day of May, in the year of our Lord one thousand eight hundred and seventy-three; and it appears to said court that there is probable cause to believe the foregoing complaint to be true.

JACOB HOMER,
First Assistant Clerk.

A copy of record. Attest:

CHA'S A. BARNARD,
First Assistant Clerk.

Municipal court of the city of Boston, holden at said Boston for the transaction of criminal business.

SUFFOLK, *ss:*

A warrant having been issued upon the above complaint, and the above-described liquors, with the vessels containing them, seized upon said warrant and with said warrant returned, on the twentieth day of May in the year aforesaid, to said court, and, after examination had, it appearing to said court that said liquors, with the vessels containing them, do not exceed in value twenty dollars, it was ordered by said court that notice be given, in accordance with the provisions of the four hundred and fifteenth chapter of the statutes of the year eighteen hundred and sixty-nine, of said commonwealth, to the above-named O'Connell, and all other persons claiming any interest in said liquors or vessels, to appear before said court, on the twelfth day of June, in the year aforesaid, at ten of the clock in the forenoon of said, to answer to said complaint, and show cause, if any they had, why said liquors and vessels should not be forfeited; and on the said twelfth day of June, in the year aforesaid, the Boston Beer Company appeared in said court, by Frederic O. Prince, its attorney, and verbally claimed all of said ale and the vessels containing the same, and John Miller also appeared

in said court by Charles F. Donnelly, his attorney, and verbally claimed all of said whiskey, rum, and gin, and the vessels containing the same, and the said Boston Beer Company and John Miller were severally admitted as parties on the trial of said cause, and the further consideration thereof was continued to the eighteenth day of June, in the year aforesaid; and on the said eighteenth day of June the said Boston Beer Company filed a plea in writing, in the words following, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Municipal court of the city of Boston for the transaction of criminal business.

In matter of the seizure of certain liquors on 19th May, 1873, whilst being transported by Patrick O'Connell in alleged violation of the laws of this commonwealth.

And now the Boston Beer Company, a corporation established by the laws of said commonwealth, appears and claims an interest in certain of said liquors & the vessels holding the same, to wit, one hundred & twenty gallons of ale, contained in four barrels, the same being the property of said company at the time of said seizure.

And said company say that while admitting that said ale was manufactured by them for sale, in this commonwealth, and that the same was being transported by them to their place of business in said Boston when seized as aforesaid, with the intention of selling the same at such place, by the statute of 1827, chapter 32 of said commonwealth, they were made a corporation "for the purpose of manufacturing malt-liquors in all their varieties in the city of Boston," "and for that purpose" had "all the powers & privileges and were subject to all the duties & requirements contained in an act passed March 3, 1809 (statute 1808, ch. 65)"; that the company was duly organized, its capital stock paid in & duly invested in real & personal estate, which were fitted for and applied to the business for which the corporation was chartered; that, by the statute of 1808, the grant to said company was subject to a reservation by force of which it might be revoked or modified, but this last-named act was repealed by the act of 1829, chapter 53, section 16, and by this repeal the legislature relinquished the powers reserved in the statute of 1808, so that the grant to the company, originally revocable in part or in whole, became irrevocable either in part or in whole; that this relinquishment of the power of revocation or alteration once made is a final extinguishment of the power and cannot be resumed; that this company have therefore the right to the use and enjoyment of their franchise as fully as though the same had been originally granted without reservation or restriction, which the State cannot interrupt or destroy without impairing the obligation of the contract arising from the grant, in violation of the Constitution of the United States.

Wherefore the said company allege that the provisions of the acts of the commonwealth, under which said seizure was made, are not applicable to them & they are not amenable thereto, and that their doings in manufacturing said ale, and transporting the same to their place of business in said Boston for the purpose of selling the same, are not contrary to law, and they pray that said ale, and the vessels containing the same, may be returned to them by order of this court.

By their att'y, F. O. PRINCE.

And on said eighteenth day of June the said Miller filed a motion in writing in the words following, to wit:

SUFFOLK, *ss:*

Municipal court of the city of Boston for the transaction of criminal business, holden at Boston. No. 7359.

COMMONWEALTH
vs.
CERTAIN INTOXICATING LIQUORS. JOHN MILLER & H. J. Slavin claimants for spirituous and vinous liquors, and Boston Beer Co. claimant as to ale.

And now come the claimants, John Miller and Henry J. Slavin, above named, and move the court that the above entitled and numbered complaint be dismissed and quashed for the following reasons:

1. That the complaint is bad for duplicity, inasmuch as it alleges that the liquors were sold and intended for sale.
2. That the service of the notice under said complaint and the return of the officer of the service of said notice is informal, defective, and insufficient.
3. That the service of the warrant of search issued under said complaint is defective, insufficient, and bad, inasmuch as it was made by one of the complainants in the complaint.
4. That so far as relates to the ale or malt liquors set forth and described in said complaint, the complaint does not set forth any cause of law for the forfeiture or condemnation of said ale or malt-liquors.
5. That the notice of seizure of proceedings for forfeiture is defective and insufficient, inasmuch as it sets forth that the cause of proceedings for forfeiture is illegally conveying said liquors.

JOHN MILLER,
H. J. SLAVIN,
By CHA'S F. DONNELLY,
Their Att'y.

And thereupon, on said eighteenth day of June, the said plea filed by said Boston Beer Company, and the said motion filed by said Miller, were severally overruled by the court, and the said court thereupon proceeded to try, hear, and determine the allegations of said complaint, and the consideration of said complaint was from time to time continued to the twenty-eighth day of June, in the year aforesaid, when it appearing to said court upon said trial that said notice was duly served, and that the liquors described in said complaint were, at the time alleged, kept and deposited, as alleged in said complaint, for the purpose of being sold in violation of the provisions of the four hundred and fifteenth chapter of the statutes of the year eighteen hundred and sixty-nine of said commonwealth, it was adjudged that all said liquors, with the vessels containing them, were forfeited to the commonwealth.

It was therefore ordered by said court that all said liquors be delivered to the commissioner provided for in section one of the four hundred and fifteenth chapter of the statutes of the year eighteen hundred and sixty-nine of said commonwealth, to be by him disposed of according to law.

And it was further adjudged by said court that the said Boston Beer

Company and the said Miller, the claimants aforesaid, severally pay one-half part of the costs of said proceedings (except the expense of seizing and keeping said liquors), taxed at ten dollars and twenty-eight cents, and that execution issue against them therefor.

From which judgment the said Boston Beer Company and the said Miller severally appealed to the superior court for the transaction of criminal business, to be holden at said Boston, within and for the county of Suffolk, on the first Monday of July next, and severally recognized with sufficient security in the sum of two hundred dollars, to prosecute their several appeals there as the law directs, and to abide the sentence of the court thereon, and the several appeals of the said Boston Beer Company and the said Miller, the claimants aforesaid, were thereupon allowed.

Attest:

CHA'S A. BARNARD,
First Ass't Clerk.

A true copy. Attest:

CHA'S A. BARNARD,
First Ass't Clerk.

A true copy. Attest:

JOHN P. MANNING,
Clerk of the Superior Court for the Transaction of Criminal Business.

(Indorsed:) 1609. Illegal transportation. 1873. No. . Complaint to search. Under chap. 415, acts of 1869, sect. 37. Commonwealth vs. Patrick O'Connell.

8 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To any constable of the commonwealth, or the sheriff of our county of Suffolk, or either of his deputies, or any constable of the city of Boston, in said county, greeting:

Whereas John Green and John S. Tobey, both of said Boston, and both of full age, and competent to testify, on the twentieth day of May, in the year of our Lord one thousand eight hundred and seventy-three, at said , in behalf of the commonwealth aforesaid, on oath, complained to the (justices of the municipal court of the city of Boston, holden at said Boston), within and for said county of Suffolk, that they have reason to believe, and do believe, that on the nineteenth day of May, in the year of our Lord one thousand eight hundred and seventy-three, at said Boston, intoxicating liquor, to wit, a certain quantity of whiskey, being about and not exceeding fifty gallons, in one-half barrel four jugs, and a certain quantity of rum, being about and not exceeding three gallons, in one jug; and a certain quantity of gin, being about and not exceeding one gallon, in one jug; and a certain quantity of ale, being about and not exceeding one hundred and twenty gallons, in four barrels, were and still are deposited by Patrick O'Connell, of said Boston, in a certain vehicle, to wit, a certain four-wheeled one-horse wagon, driven by said O'Connell, in said Boston, in said county; said liquor deposited and being conveyed as aforesaid to another person other than the said O'Connell, whose name to said complainants is now unknown; and said unknown person intending to sell said liquor in violation of the 415th chapter of the statutes of the year of our Lord eighteen hundred and sixty-nine of said commonwealth; and said liquor has been sold in said commonwealth in violation of said chapter; and

the said complainants then and there having reasonable cause to believe that the said liquor has been so illegally sold and is so intended for illegal sale as aforesaid in this Commonwealth, whereby said liquor has become liable to be forfeited.

And said complainants have also prayed that due process may issue to search for said liquor, and that such further proceedings may be had in the premises as to law and justice in that behalf may appertain; and whereas it appears to said court, on the complaint aforesaid, that probable cause has been shown for the issuing of a warrant of search thereupon—

These, therefore, are to require you, in the name of the Commonwealth, taking with you proper assistants, forwith to enter the vehicle herein above-described, in the day or night time, and make dilligent and careful search for all the liquor hereinabove described, and, if such liquor is found therein, to seize and convey the same, and the vessels which contain such liquor, to some place of safety, and safely keep the same to await the final action and decision of the court upon said complaint. You are also directed to summon said complainants as witnesses to testify what they know in relation to the subject-matter of this complaint.

Herein fail not and make due return of this warrant with your doings thereon.

Witness, Mellen Chamberlain, esquire, at said Boston, this twentieth day of May, in the year of our Lord one thousand eight hundred and seventy-three.

[L. S.]

JACOB HOMER,
First Ass't Clerk.

A copy of record. Attest:

CHA'S A. BARNARD,
First Ass't Clerk.

A true copy. Attest:

JOHN P. MANNING,
Clerk of the Superior Court for the Transaction of Criminal Business.

BOSTON, *May 20th*, 1873.

SUFFOLK, *ss:*

By virtue of the within precept, I have searched the within-described vehicle, and have seized therein and conveyed to a place of safety the liquors described in the within warrant, with the vessels in which they are contained, to wit:

About 25 gallons of whiskey, in one-half barrel & four jugs; about 3 gallons of rum, in one jug; about 1 gallon of gin, in one jug; about 120 gallons of ale, in four barrels; and I have summoned the within-named complainants to appear as witnesses.

JOHN GREEN,
Constable of the Commonwealth.

Officer's fees.—Service, $0.50; travel, mile, ; summoning witnesses, ; travel for summoning witnesses, miles, ; aid, 1; paid carting for removal of liquors, .

I, , on oath say that the following items of expense charged in the above bill were necessarily incurred and actually disbursed, viz:

Paid aid, $1.

" expense removing liquors, $.

JOHN GREEN,
Constable of the Commonwealth.

Municipal court of the city of Boston.

JUNE 12, 1873.

SUFFOLK, *ss :*

Subscribed and sworn to before me.

CHA'S A. BARNARD,
Ass't Clerk.

Trial Justice.

A copy of record. Attest:

CHA'S A. BARNARD,
Ass't Clerk.

Trial Justice.

(Indorsed:) 1609. Illegal transportation. 1873. No. . Search-warrant under chap. 415, acts of 1869, sect. 37. Commonwealth vs. Patrick O'Connell.

9 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss :

The municipal court of the city of Boston.

To any constable of the commonwealth, the sheriff of our county of Suffolk, or either of his deputies, or any constable of the city of Boston, in said county:

You are hereby commanded to serve the annexed notice, by delivering an attested copy thereof into the hands of Patrick O'Connell, of Boston, in the county of Suffolk, or by leaving an attested copy thereof at his usual place of abode, and also by posting up another attested copy thereof in a certain public place in said city of Boston, to wit, on the post-office, a public building in said city of Boston, and also by publishing an attested copy thereof two times, in the Daily Evening Traveller, a newspaper published in said county of Suffolk; and you are hereby commanded to serve said copy on said O'Connell, and to post another copy as above directed, and to publish the copy of said notice the first time at least fourteen days before the twelfth day of June, in the year of our Lord one thousand eight hundred and seventy-three.

Hereof fail not, and make due return of this warrant, with your doings thereon.

Witness Mellen Chamberlain, esquire, at Boston, this twentieth day of May, in the year of our Lord one thousand eight hundred and seventy-three.

[L. S.] JOHN C. LEIGHTON, *Clerk.*

COMMONWEALTH OF MASSACHUSETTS:

To Patrick O'Connell, of Boston, in the county of Suffolk, and to any and all other persons claiming any interest in about 25 gallons of whiskey, in 1 half-barrel and 4 jugs; about 3 gallons of rum, in 1 jug; about 1 gallon of gin, in 1 jug; about 120 gallons of ale, in 4 barrels; which, by virtue of a warrant issued by the municipal court of the city of Boston, holden at said Boston for the transaction of criminal business within and for said county, have been seized in a certain vehicle, to wit, a certain four-wheeled one-horse wagon, driven by the said O'Connell, in said Boston, on the twentieth day of May, in the year one thousand eight

hundred and seventy-three, the value of which liquors, with the vessels containing them, does not, in the opinion of said court, exceed twenty dollars:

You are hereby required to appear before said municipal court, to be holden at Boston, in said county, for the transaction of criminal business, at ten o'clock a. m., on the twelfth day of June, in the year one thousand eight hundred and seventy-three, to answer to the complaint against said liquors and the vessels containing them, and for trial, and to show cause, if any you have, why said liquors and the vessels containing them should not be forfeited for being illegally conveyed by said O'Connell, in violation of the laws of this commonwealth.

Witness, Mellen Chamberlain, esquire, at Boston, this twentieth day of May, in the year one thousand eight hundred and seventy-three.

[L. S.] JOHN C. LEIGHTON, *Clerk*

A true copy. Attest:

CHA'S A. BARNARD.
First Ass't Clerk.

A true copy. Attest:

JOHN D. MANNING,
Clerk of the Superior Court for the Transaction of Criminal Business.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

BOSTON, *May 21st*, 1873.

By virtue of the within precept, I have served the annexed notice as within directed, by giving in hand, on the twenty-first day of May, in the year above written, an attested copy thereof, to the within-named Patrick O'Connell, and on the same day posted a like attested copy thereof in the public place described in the within precept, to wit, on the post-office, a public building in said city of Boston, being the same city in which the liquors, and vessels containing the same, described in said precept, were seized on the twentieth day of May, in the year above written; and I have also, in obedience to said precept, caused an attested copy of said notice to be published two times, in the Daily Evening Traveller, a newspaper published in said county of Suffolk, on ; the first publication in said newspaper, the serving said notice as above stated upon the said O'Connell, and the posting the same on the building as above stated, being more than fourteen days before the time within appointed for the trial.

JOHN GREEN,
Constable of the Commonwealth.

Officer's fees.—Paid publication bill, 7.50.

A true copy. Attest:

CHA'S A. BARNARD,
First Ass't Clerk.

(Indorsed:) 1609. 1873. No. . Warrant to serve notice with notice. Under chap. 415, acts of 1869, sect's 48 and 49. Commonwealth vs. Patrick O'Connell. Copy.

10 COMMONWEALTH
vs.
CERTAIN INTOXICATING LIQUORS, BOSTON Beer Company, claimant.

The complaint and proceedings in this case were filed at the July term, 1873, when the said company, by its attorney, came into court and made claim to certain liquors named in said complaint, together with the vessels containing the same.

Said complaint was thence continued from term to term to the last December term; when the court ordered that the issue be submitted to the jury in the form following, to wit:

Whether any part, and, if so, what part of the liquors described in the complaint was, at the time of the making of the complaint, owned and kept by the parties named in said complaint, for the purpose of being sold contrary to the provisions of chapter 415 of the acts of 1869 of the general court of this Commonwealth, as alleged in said complaint.

And a jury were thereupon empanelled and sworn to try said issue, to wit: S. Bradford Morse, foreman, and eleven of his fellows, who,
11 after hearing and understanding all matters and things concerning the same, returned their verdict, and on oath said thereof as follows:

The jury find that the ale so described and seized was at the time of the making of the complaint deposited and kept by the Patrick O'Connell named in the complaint, in the vehicle named in the complaint, for the purpose of being sold in this commonwealth contrary to law.

S. BRADFORD MORSE, *Foreman.*

Whereupon the said Boston Beer Company, by its attorneys, alleged certain exceptions to the ruling and opinion of the court upon certain matters of law, which being reduced to writing, as on file, were submitted to the court, and is hereto annexed.

Said complaint was thence continued to the January term, A. D. 1874, when the exceptions aforementioned, having been examined by the presiding justice and found conformable to the truth, were allowed, and ordered to be transmitted to the supreme judical court; and this
12 complaint was thence continued from term to term to the June term 1874, when a rescript was received from the supreme judicial court; that is to say:

"Ordered, that the clerk of said (superior) court make the following entry under said case in the docket of said court:

"Exceptions overruled for the reasons following:

"The act of 1869, ch. 415, does not impair the obligations of the contract contained in the charter of the claimant, so far as it relates to the sale of malt liquors, but is binding on the claimant to the same extent as on individuals.

"The act is in the nature of a police regulation in regard to the sale of a certain article of property, and is applicable to the sale of such property by individuals and corporations, even where the charter of the corporation cannot be altered or repealed by the legislature." (See opinion filed with reporter.) 115 Mass. —

13 And now it is ordered that this complaint stand continued unto the further order of the court thereon.

And now, at the present December term, A. D. 1874, it is ordered that

the liquors aforesaid be declared forfeit to the Commonwealth, and that a warrant issue for the disposal of the same.

All which appears of record in said superior court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Boston, aforesaid, this seventeenth day of December, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] JOHN P. MANNING,
Clerk of said Superior Court.

14 COMMONWEALTH OF MASSACHUSETTS.

Suffolk, ss:

Superior court for the transaction of criminal business, December term, A. D. 1873.

COMMONWEALTH
vs.
CERTAIN INTOXICATING LIQUORS, CLAIMANT
Boston Beer Company.

In the matter of the complaint against Patrick O'Connell, found, as therein alleged, in the act of transporting certain liquors contrary to the laws of the commonwealth.

The Boston Beer Company, a corporation existing under the laws of said commonwealth, appeared and claimed an interest in certain of said liquors, and the vessels holding the same, seized under said complaint, to wit, one hundred and twenty gallons of ale and four barrels.

At the trial of the allegations of the complainant the following facts, admitted by the parties, were found by the jury:

That the Boston Beer Company were made a corporation, by the statute of this commonwealth of the year 1827, "chapter 32, for the purpose of manufacturing malt liquors in all their varieties, in the city of Boston, and for that purpose shall have all the powers and privileges, and be subject to all the duties and requirements, contained in an act passed on the third day of March, in the year of our Lord one thousand eight hundred and nine," entitled "An act defining the general powers and duties of manufacturing corporations, and the several acts in addition thereto."

That said corporation was authorized by said act to hold and possess such real estate, not exceeding in value fifty thousand dollars,
15 and such personal estate, not exceeding one hundred thousand dollars, as may be found necessary and convenient for carrying on the manufacture of malt liquors in the city of Boston.

That said corporation was duly organized, its capital stock paid in, that it now exists as a corporation, and it has been and now is engaged in the business for which it was chartered.

That said act, passed on the third day of March, 1809, and all other acts in addition thereto, were repealed by the act of 1829, chapter 53, section 16, passed March 1, 1830.

That said Boston Beer Company have an interest in certain of said liquors, and the vessels holding the same, to wit, one hundred and twenty gallons of ale (the same being malt liquors), and four barrels, in which said ale is contained; all said ale and barrels being the property of said company at the time of said seizure. That said ale was manufactured by said company at their brewery in said Boston, and at the time of said seizure was being transported by them by Patrick O'Con-

nell, named in said complaint, and as their agent at their place of business in said Boston, for the purpose of being sold by them at such place.

The said claimant asked the court to instruct the jury as follows:

That by the repeal of the statute passed March 3, 1809 (Statute 1808, chapter 65), the legislature relinquished the power reserved in this statute to repeal and alter the grant made by its charter to the company; that this relinquishment of the power of repeal or alteration was a final extinguishment of the power, and cannot be resumed.

That the act of 1869, chapter 415, entitled "An act concerning the manufacture and sale of intoxicating liquors," and the acts in addition thereto, prohibiting the manufacture and sale and the transporting for sale of intoxicating liquors, impair the obligation of the contract contained in the charter of said company, and, so far as relate to such prohibition, are in violation of the Constitution of the United States, and not therefore binding on said company.

That by reason of the foregoing the said company could lawfully manufacture, own, and transport said ale, and the vessels containing the same, for the purpose of being sold by it at its place of business in said Boston; and that therefore the seizure of said ale and vessels was wrongfully made, and should be returned to said claimant.

The judge refused to give such instructions, but ruled and instructed the jury that, as it was agreed and admitted that the said company was the manufacturer and owner of said ale at the time of said seizure, and was then transporting the same as aforesaid by its agent, the said Patrick O'Connell, for the purpose of sale in this commonwealth contrary to the provisions of chapter 415 of 1869, it was lawfully seized, and liable to forfeiture to the commonwealth.

16 The jury found that the ale described in said complaint, and seized upon the warrant, was at the time of the making of the complaint deposited and kept by Patrick O'Connell, as agent of the claimants, in the vehicle named in the complaint, for the purpose of being sold in this commonwealth, contrary to the provisions of the act of 1869, chapter 415, entitled "An act concerning the manufacture and sale of intoxicating liquors," and the acts in addition thereto.

And to the foregoing rulings and instructions the said claimant objects, and prays his exceptions may be allowed.

By its attorney, F. O. PRINCE.

January 10, 1874.
Allowed.

P. EMORY ALDRICH,
Justice of Superior Court.

A copy. Attest:

JOHN P. MANNING,
Clerk of said Superior Court.

(Indorsed:) Commonwealth *vs.* Certain Intoxicating Liquors, Boston Beer Company, claimant. Claimant's exceptions. Suffolk County.

(Indorsement on cover:) No. 277. The Boston Beer Company, claimant of certain intoxicating liquors, plaintiff in error, vs. The Commonwealth of Massachusetts. Massachusetts superior court. Filed 21st October, 1875.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1877.

No. 882.—77

THE BOSTON BEER COMPANY, CLAIMANTS,

Plaintiffs in Error,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

STATEMENT OF THE CASE.

The Boston Beer Company was incorporated by the 32d Chapter of the Acts of 1827, passed Feb. 1, 1828.

The said Chapter is entitled an "Act to incorporate the "Boston Beer Company," and is as follows: —

"SECTION 1. — Be it enacted by the Senate and House of "Representatives, in General Court assembled, and by author- "ity of the same, that Gamaliel Bradford, Nathan Rice, "Benjamin Thaxter, and Elijah Loring, together with such "other persons as are or may become associates with them, "their successors and assigns, be, and they hereby are, made "a corporation by the name of the Boston Beer Company, for "the purpose of manufacturing malt liquors in all their vari- "eties, in the city of Boston, and for that purpose shall have "all the powers and privileges, and be subject to all the "duties and requirements contained in an act passed on the "third day of March, in the year of our Lord one thousand "eight hundred and nine, entitled 'An Act defining the Gen- "'eral Powers and Duties of Manufacturing Corporations' "and the several acts in addition thereto.

"SECT. 2. — Be it further enacted, that the said corpora- "tion may hold and possess such real estate, not exceeding "in value the sum of fifty thousand dollars, and such per- "sonal estate not exceeding one hundred thousand dollars, as "may be found necessary and convenient for carrying on the "manufacture of malt liquors in the city of Boston."

The powers and duties referred to as contained in the said statute, passed March 3, 1809, are the power to choose a clerk, treasurer, directors, agents, and other corporate officers; to establish rules and by-laws for the government

of the corporation; to divide the corporate property into shares, with the right to assess the same, and to sell the shares for non-payment of assessments.

The duties and requirements referred to are the liability of the corporators, under certain circumstances, for corporate debts.

Said company was duly organized, its capital stock fully paid in, and duly invested in real and personal estate, which were fitted for and applied to the business for which the corporation was chartered. It continued to exist as a corporation, and to carry on its business until the seizure hereinafter mentioned. It still exists as a corporation.

The said statute, passed March 3, 1809, was repealed by the statute passed Feb. 23, 1830. [Act of 1829.]

By the Act passed June 19, 1869, Chap. 415, entitled "An "Act concerning the Manufacture and Sale of Intoxicating Liquors," the manufacture of malt liquors to be sold in Massachusetts, and the owning, possessing or keeping the same for sale, are prohibited under penalties of fine and imprisonment, and the forfeiture of the liquors to the commonwealth; but it is claimed by the plaintiffs in error that such prohibition, by reason that it impairs the obligation of the contract in the charter granted to them, is repugnant to the Constitution of the United States, and is therefore, as respects the Boston Beer Company, inoperative and void.

Sect. 1 of said Act of 1869 provides "that the governor, "with the advice and consent of the council, shall as soon "after the passage of this Act as may be, and thereafter annu- "ally in the month of January, appoint and commission a "competent person as commissioner to purchase and sell "spirituous and intoxicating liquors of a pure quality, to the "several cities and town agents appointed under the provis- "ions of this Act, and to regularly appointed agents in cities "and towns of other of the New England States, and to no "other person."

By the provisions of Sect. 30 of said Act, "Ale, porter, "strong beer, lager bier, and all wines shall be considered "intoxicating within the meaning of this Act, as well as dis- "tilled spirits."

By the provisions of Sect. 9 of said Act, "Said commis- "sioner shall appoint in the city of Boston as many agents, "not exceeding five, as he thinks the interests of the citizens "require, who shall have the same powers and be subject to "the same obligations as agents appointed by the mayor and "aldermen of cities."

By the provisions of Sect. 12 of said Act, "The county "commissioners of the several counties, and the mayor and "aldermen of the city of Boston, on the first day of July an- "nually, or as soon thereafter as practicable, *may* authorize "such persons as apply to them in writing to manufacture "spirituous or intoxicating liquors at places within their re- "spective jurisdictions, and to sell the same in quantities not "less than *thirty* gallons to be *exported* or to be used in the "*arts*, or for *mechanical* and *chemical* purposes in this Com- "monwealth."

By Sect. 13, "Every such person shall receive from the "board by which he is so authorized a certificate giving him "authority to manufacture and sell spirituous and intoxicat- "ing liquors as aforesaid," and shall "give a bond with two "good and sufficient sureties in the sum of six thousand dol- "lars," setting forth in substance that he "has been duly "authorized to manufacture spirituous and intoxicating "liquors, and to sell the same in quantities not less than "thirty gallons, to be exported or used in the arts, or for "mechanical and chemical purposes, or in any quantity to "duly authorized agents of cities and towns, as by law pro- "vided," and binding him to "conform to the provisions of "law relating to the business which he is authorized as above "to pursue, and shall violate no law of the Commonwealth "touching the manufacture and sale of spirituous or intoxi-

"cating liquors during the term for which he is authorized "to manufacture such liquors, as aforesaid."

By Sect. 17 of said Act, "The selectmen of every town "containing less than five thousand inhabitants *may* — and "the mayor and aldermen of every city, and the selectmen of "every town containing more than five thousand inhabitants "shall — on the first Monday of July annually, or as soon "thereafter as convenient, appoint for one year, unless sooner "removed by the board appointing them, one or more suitable "persons as agents of such place to purchase and sell at some "convenient places therein, spirituous or intoxicating liquors "to be used in the *arts* or for *medicinal*, *chemical* and "*mechanical* purposes, and no other."

By Sect. 18, each agent shall give bonds with sureties in the sum of six hundred dollars, to "conform to the provisions of law relating to the business for which he is appointed."

By Sect. 21 of said Act, "each agent shall purchase "of the Commissioners appointed by Sect. 1, all spirit- "uous or intoxicating liquor to be sold by him." Any agent "purchasing such liquor of any other person, or selling such "liquor purchased by him of any other person, shall be liable "to the penalties provided in Sect. 33 for being a com- "mon seller." These are fine and imprisonment.

By the provisions of Sect. 30 of said Act, "No person "shall manufacture for sale, or sell by himself, his clerk, "servant or agent, directly or indirectly, any spirituous or "intoxicating liquor, or any mixed liquor, part of which is "spirituons or intoxicating, unless he is authorized as pro- "vided in this Act. *Ale*, *porter*, *strong beer*, *lager bier*, and "all wines shall be considered intoxicating within the mean- "ing of this Act, as well as distilled spirits, but this enumer- "ation shall not prevent any other pure or mixed liquors "from being regarded as intoxicating."

Said Sect. 30 is amended by the Act of 1870, Chapter

389, Sect. 1, by "striking therefrom ale, porter, strong beer, lager bier."

By the Act of 1871, Chapter 334, Sect. 1, the words, "ale, porter, strong beer, lager bier," are inserted before the words, "and all wines," in Sect. 30, Chapter 415, Act 1869.

By the provisions of Sect. 31, of said Act of 1869, "no "person shall own, possess, or keep any spirituous or intoxi- "cating liquor, *with intent* to sell the same in this Common- "wealth, and no owner of such liquor shall permit or suf- "fer any other person to keep the same for the purpose of "selling it in this Commonwealth unless authorized as pro- "vided in this Act."

By the provisions of Sect. 44, upon the complaint of two persons that spirituous or intoxicating liquors are kept or deposited in a store, building, vehicle, or place intended for sale, contrary to the provisions of the Act of 1869, a Justice of the Peace or Police Court, if there is probable cause to believe the complaint true, shall issue a warrant of search to any sheriff or constable, commanding him to search for and seize such liquor with the vessels in which it is contained, and keep the same until final action is had thereon.

That by the provisions of Sect. 48, upon any such seizure, if in the opinion of the justice or Court before which the warrant is returned, the value of the liquor seized with the vessels containing it, does not exceed twenty dollars, a written notice under seal, signed by the Justice or the clerk of the Court, shall be issued "commanding the per- "son complained against as the keeper of the liquor seized, "and all other persons claiming any interest therein, or in "the casks or vessels containing the same, to appear before "said justice or Court, at a time and place therein named, "to answer said complaint, and show cause, if any they have, "why such liquor, with the vessels containing it, should not "be forfeited."

By Sect. 51, "at the time and place designated in the "notice the person complained against, or any person claim- "ing an interest in the liquor and vessels seized," may appear and make his claim verbally or in writing, and a record of his appearance and claim shall be made, and he shall be admitted as a party on the trial. If at the trial "it appears "that the liquor, or any part thereof, was at the time of mak- "ing the complaint owned or kept by the person alleged "therein, for the purpose of being sold in violation of this "Act, the Court or justice shall render judgment that such "and so much of the liquor so seized as was so unlawfully "kept, and the vessels in which it is contained, be forfeited "to the Commonwealth."

By the provisions therefore of the law of 1869, Chap. 415, no one can *manufacture for sale, or sell*, any spirituous or intoxicating liquors, including all malt liquors, without being authorized, as provided in said Act; and the county commissioners and the mayor and aldermen of the city of Boston MAY authorize persons to manufacture and sell liquors in quantities of not *less than thirty gallons, to be exported* or to be used in the *arts*, or for *mechanical* and *chemical* purposes.

As malt liquors are not used in the *arts*, nor for *mechanical* or *chemical* purposes, their *manufacture* and *sale* for consumption in Massachusetts are *wholly prohibited*. They can only be manufactured and sold in quantities of not less than *thirty gallons* for *exportation*.

The plaintiffs in error, on the 20th of May, 1873, were the owners of one hundred and twenty gallons of malt liquors, of the kind known as *ale*, which were manufactured by them at their brewery in the city of Boston. The liquors were in the possession of their agent, Patrick O'Connell, for transportation to their place of business in said city for the purpose of being sold there. While in such possession the same were seized, upon a warrant issued by the Municipal

Court of said city, and the plaintiffs notified to appear before said Court, and show cause why the said liquors and the vessels containing them, should not be forfeited to the Commonwealth under the provisions of the Act of 1869, Chap. 415.

The plaintiffs appeared, and at the trial claimed that the liquors were not liable to seizure and forfeiture because of their chartered rights as hereinbefore set forth, and moved the Court to order the same to be returned to them.

The Court overruled the motion, and adjudged said liquors and the vessels containing the same to be forfeited to the Commonwealth. The plaintiffs appealed from said judgment to the Superior Court to be holden at Boston within and for the county of Suffolk on the first Monday of July, 1873.

At the trial in said Superior Court the following facts were found by the jury: —

"That the Boston Beer Company were made a corporation "by the Statutes of Massachusetts of the year 1827, Chap. "32, for the purpose of manufacturing malt liquors in all "their varieties in the city of Boston, and for that purpose "shall have all the powers and privileges, and be subject to all "the duties and requirements contained in an Act passed on "the third day of March in the year one thousand eight hun-"dred and nine, entitled "An Act defining the general powers "and duties of manufacturing corporations, and the several "acts in addition thereto." That said corporation was duly "organized, its capital stock paid in, that it now exists as a "corporation, and it has been and now is engaged in the busi-"ness for which it was chartered.

"That said Act, passed the third day of March, 1869, and "all other Acts in addition thereto, were repealed by the Act "of 1829, Chap. 53, Sect. 16, passed March 1, 1830.

"That said Boston Beer Company have an interest in cer-"tain of said liquors, and thevessels holding the same, to wit, "one hundred and twenty gallons of ale (the same being malt

"liquors), and four barrels in which said ale is contained, all "said ale and barrels being the property of said company at "the time of the said seizure. That said ale was manufac "tured by said company, at their brewery, in said Boston, and "at the time of the said seizure was being transported by "them, by Patrick O'Connell, named in said complaint, and "as their agent, at their place of business, in said Boston, for "the purpose of being sold by them at such place."

The plaintiffs in error asked the Court to instruct the jury as follows: —

That by the repeal of the statute passed March 3, 1809 (Statute 1808, Chap. 65), the legislature relinquished the power, reserved in this statute to repeal and alter the grant made by its charter to the company, that this relinquishment of the power of repeal, or alteration, was a final extinguishment of the power, and cannot be resumed.

That the Act of 1869, Chap. 415, entitled "An Act con- "cerning the Manufacture and sale of Intoxicating Liquors," and the Acts in addition thereto, prohibiting the manufacture and sale, and the transportation for sale, of intoxicating liquors, impair the obligation of the contract contained in the charter of said company, and so far as relates to such prohibition are in violation of the Constitution of the United States, and not therefore binding on said company.

That by reason of the foregoing, the said company could lawfully manufacture, own and transport said ale, and the vessels containing the same, for the purpose of being sold by it, at its place of business, in said Boston; and that therefore the seizure of said ale and vessels was wrongfully made, and should be returned to said claimant.

The judge refused to give such instructions, but ruled and instructed the jury that as it was agreed and admitted that the said company was the manufacturer and owner of said ale at the time of said seizure, and was then transporting the same, as aforesaid, by its agent, the said Patrick O'Connell,

for the purpose of sale in this Commonwealth, contrary to the provisions of Chap. 415, of the Act of 1869, it was lawfully seized and liable to forfeiture to the Commonwealth.

The jury found that ale was deposited and kept by Patrick O'Connell, as agent of the plaintiffs in error, for the purpose of sale, contrary to the provisions of said Act of 1869, Chap. 415.

The plaintiffs in errror excepted to the said rulings and instructions, and the same having been allowed, were transmitted to the Supreme Judicial Court, who, at the June term, 1874, thereof, overruled the same for the reasons following:

Opinion S. J. C.

"The Act of 1869, Chap. 415, does not impair the obliga-
"tions of the contract contained in the charter of the claim-
"ant. so far as relates to the sale of malt liquors, but
"is binding on the claimant to the same extent as on indi-
"viduals.

"The Act is in the nature of a police regulation in regard
"to the sale of a certain article of property, and is applicable
"to the sale of such property by individuals and corpora-
"tions, even where the charter of the corporation cannot be
"altered or repealed by the legislature."

Thereupon, at the December term, A. D. 1874, of said Superior Court, it was ordered that the liquors aforesaid be declared forfeited to the Commonwealth, and that a warrant issue for the disposal of teh same.

Assignment of Errors.

The plaintiffs assign for error that the Supreme Judicial Court erred in deciding that the Act of 1869, Chap. 415, does not impair the obligation of the contract contained in the charter of the plaintiffs so far as relates to malt liquors.

PLAINTIFFS' BRIEF.

First. Charters of incorporation, which are granted for the private benefit or purposes of the corporators, are held to be contracts between the legislature and the corporators, having for their consideration the liabilities and duties which the corporators assume by accepting them.

Cooley: Constitutional Limitations, 278, *and cases cited.*

"The legislature says to public-spirited citizens, If you "will embark, with your time, money and skill, in an enter- "prise which accommodates the public necessities, we will "grant to you, for a limited period or in perpetuity, privileges "that will justify the expenditure of your money and the em- "ployment of your time and skill. Such a grant is a contract "with mutual advantages, and justice and good policy alike "require that the protection of the law should be assured to it."

Binghamton Bridge Case, 3 *Wallace*, 73.

"The objects for which a corporation is created are uni- "versally such as the government wishes to promote. They "are deemed beneficial, and this benefit constitutes the con- "sideration and, in most cases, the sole consideration."

Dartmouth College v. *Woodward*, 4 *Wheaton*, 519.

A legislature cannot repeal a statute creating a private corporation, and thereby destroy vested rights.

Territt v. *Taylor*, 9 *Cranch*, 52.

Rights legally vested in a corporation cannot be controlled or destroyed by any subsequent statute unless a power be reserved for the purpose.

Wales v. *Sutton*, 2 *Mass.* 143.

Second. That the corporation in this case was authorized to sell and dispose of its products, as well as to manufacture, does not admit of a doubt. Without this authority the charter would have been utterly worthless.

When a thing is granted the law giveth impliedly whatever is necessary for the taking and enjoying of the same.

Coke Littleton, 56.
Sheppard: Touchstone, 49. *Thayer* v. *Payne*, 2 *Cush.* 327.

When the use is granted, everything is granted by which the grantee may have and enjoy this use.

Pomfret v. *Ricroft*, 1 *Saunders*, 321.
Darcy v. *Askwith*, *Hob.* 234.

What is implied in a statute or contract is as much a part of it as what is expressed. A thing within the intention of the makers of the statute is as much within the statute as if it were within the letter.

United States v. *Babbitt*, 1 *Black*, 61.
Planters' Bank v. *Grant*, 6 *Howard*, 318.

This is a contract, and although the State is a party, it ought to be construed according to those well-settled principles which regulate contracts generally.

Huidekooper, Lessee, v. *Douglass*, 3 *Cranch*, 1.

Would this company have acquired any greater right or power, if its charter had expressly authorized it to manufacture and sell, or to manufacture for sale?

The implied right to enjoy the thing granted is different from the implied right to exclude others from enjoying — to exclude competition.

It is a principle of common sense, as well as of common law, that when a thing is granted, whatever is necessary to its enjoyment is granted also. Can the legislature have power to do that indirectly which it cannot do directly? If it cannot take away or remove the franchise itself, can it take away its whole substance and value?

Story, Justice, in *Charles River Bridge* v. *Warren Bridge*, 11 *Pet.* 420.

The principle adopted by the Supreme Court of the United States, in respect to impairing the obligation of contracts, extends as fully to a case where a material and essential part of the grant is impaired as to a case where it is entirely impaired.

People v. *Platt*, 17 *Johnson*, 215.

The limits to the exercise of the police power must be this: —

The regulations must have reference to the comfort, safety and welfare of society. They must not conflict with any provisions of the charter, and they must not, under pretence of regulating, take from the corporation any of its essential rights and privileges which the charter confers.

Cooley: Constitutional Limitations, 576, *and cases cited.*

It is conceded that the powers expressly or by necessary implication conferred by the charter, and which are essential to the successful operation of the corporation, are inviolable. Any act substantially paralyzing the franchise or destroying the profits arising therefrom would no doubt be void.

Thorpe v. *Burlington and Rutland R. R.*, 27 *Vermont*, 140.

From the acceptance of its charter, in 1827, the Boston Beer Company had the right to sell its products; to export for sale to foreign countries and other States; to sell in this State, by retail or wholesale; to sell in any quantities to any purchaser, to be used for any purpose. This was he consideration which induced the grant. This was the consideration which induced the acceptance. Upon this consideration the corporators expended their money, and incurred the expenses necessary to the establishment of their manufactory.

Third. If, by the act of incorporation and the acceptance thereof, this company acquired the right to sell, as well as to manufacture, the only inquiry is, has this right to sell been materially or essentially impaired? It will hardly be denied that if the statutes of 1869 had utterly forbidden the sale by the corporation, it would have violated the obligation of the contract. While it is conceded that it would have been competent for the legislature, in the exercise of its police power, to regulate the sale, it is apparent on examination that the statute of 1869 goes far beyond this, and in fact defeats the object had in view by both parties to the contract: in short, "paralyzes the franchise."

By Sect. 30, the company is expressly forbidden "to manufacture for sale, or directly or indirectly to sell its products, unless authorized as provided in other sections of the "Act."

By Sect. 12, the mayor and aldermen of cities and the selectmen of towns *may* authorize such persons as apply in writing to manufacture at places within their jurisdiction, and to sell in quantities not less than thirty gallons, to be exported or to be used in the arts, or for mechanical or chemical purposes, which authority shall continue for one year, unless sooner revoked.

By Sect. 13, the applicant is not to receive his certificate

until he shall have executed, with two sureties, a bond in the penal sum of $6,000; which bond is to recite that he has been authorized to manufacture and sell in quantities not less than thirty gallons, to be exported or used in the arts or for mechanical or chemical purposes, and in any quantity to city or town agents as provided by law.

By Sect. 17, the selectmen of every town of less than five thousand inhabitants may, and the mayor and aldermen of every city and the selectmen of every town of more than five thousand inhabitants shall, appoint one or more suitable persons as agents for one year, to purchase and sell.

By Sect. 1, the governor, by and with advice of council, shall appoint a competent person as commissioner to purchase liquors of pure quality, and to sell them to city and town agents appointed by the mayor and aldermen of cities and selectmen of towns, and to the regularly appointed city and town agents in the other New England States.

But by Sect. 21, each city and town agent shall purchase of the commissioner appointed under Sect. 1 all liquors to be sold by him. And if he shall purchase of any other person he shall be liable to the pains and penalties provided in Sect. 33. While, therefore, it might be inferred from the recital in the bond, to be given by the licensed manufacturer, that he was authorized by his certificate to sell to the city and town agents, it is clear that they cannot purchase of him.

In order that this corporation may manufacture for sale, it must be so fortunate as to obtain a license, which may at any moment be revoked. And while it holds a license it can only sell in quantities less than thirty gallons, to be exported or to be used in the arts or for mechanical or chemical purposes. It cannot, if the Act of 1869 is enforced, dispose of its products by retail; it cannot export them in any quantities for sale in other States or foreign countries. It canno

sell in the State for exportation in less quantities than thirty gallons, or to be used in the arts or for mechanical or chemical purpose,— uses and purposes, by the way, for which beer is never wanted.

Is it not clear that the franchise would be utterly worthless?

HENRY W. PAINE.
FREDERICK O. PRINCE.

No. 277

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1877.

BOSTON BEER COMPANY, CLAIMANTS,

Plaintiffs in Error,

vs.

COMMONWEALTH OF MASSACHUSETTS.

PLAINTIFFS' BRIEF IN REPLY.

Supreme Court of the United States.

OCTOBER TERM, 1877.

BOSTON BEER COMPANY, CLAIMANTS,

PLAINTIFFS IN ERROR.

v.

COMMONWEALTH OF MASSACHUSETTS.

PLAINTIFFS' BRIEF IN REPLY.

The counsel who prepared the brief for the Commonwealth must have misapprehended the state of the pleadings.

In the Municipal Court, from which the warrant for seizure was issued, and to which it was returnable, the plaintiff corporation claims the one hundred and twenty gallons of ale, in its plea, avers that it was by the company manufactured for sale, sets forth its charter, avers that as a corporation it was duly organized, that its capital stock had been paid in, that its charter was made irrevocable, that it has the right to the use and enjoyment of its franchise, which the State cannot interrupt or destroy, without impairing the obligation of the contract arising from the grant; wherefore the company allege that the provisions of the act under which the seizure was made are not applicable to them, and they are not amenable thereto, and that their doings in manufacturing said ale, and transporting the same to their place of business for the purpose of selling the same, are not contrary to law, etc. (*See printed record, page* 5.) This plea was overruled by this Court, and by this Court it was adjudged that all the liquor seized, with the vessels containing the same, be forfeited to the Commonwealth.

No new plea was filed in the appellate Court. The facts averred in the original plea were agreed, and found by the jury to be true; and the Court was requested, in substance, to instruct the jury that the Act of 1869, Chap. 415, and the Acts in addition thereto, prohibiting the manufacture and sale and the transporting for sale of intoxicating liquors, impaired the obligation of the contract contained in the charter, and therefore were not binding on the corporation, and that the seizure was wrongfully made. The presiding judge refused to give these instructions, and did instruct the jury that upon the facts agreed the liquor was lawfully seized and liable to forfeiture to the commonwealth. (*Printed Record, pp.* 12, 13.) To the instructions and refusal to instruct the plaintiff excepted. This bill of exceptions was allowed. The Supreme Court overruled the exceptions, "for the reason that the Act of 1869 does not impair the obligation of the contract contained in the charter of the claimant, so far as it relates to the sale of malt liquors, but is binding on the claimant to the same extent as on individuals." "The Act is in the nature of a police regulation in regard to the sale of a certain article of property, and is applicable to the sale of such property by individuals and corporations, even where the charter of the corporation cannot be altered or repealed by the legislature."

Printed Record, p. 11.

It is manifest that no new plea was filed in the Superior Court; that the trial there was on the plea filed in the Municipal Court, and on none other. The question raised was presented to the highest Court in the State, though the case itself remained in the Superior Court (as by statute it must in Massachusetts), and that the judgment of the highest Court was adverse to the claimant.

The question whether the Act of 1869 did impair the

obligation of the contract contained in the claimants' charter is therefore legitimately before this Court.

First. Was it competent for the legislature to make a contract with the plaintiff corporation that it would not revoke its chartered rights and immunities, or essentially impair its franchise?

It would seem to be now settled, by numerous decisions, that the legislature of a State may make such a contract, — may bind itself and its successors by surrender of a portion of its legislative power. The legislature may create a corporation with exclusive right to build a toll bridge within certain fixed limits, or with exclusive right to construct a railroad between two certain points. To this extent, the legislature may surrender its power, or, rather, to this extent the legislature may exercise its power.

Binghamton Bridge Case, 3 *Wallace*, 73.
Boston & Lowell Railroad v. *Salem & Lowell Railroad*, 2 *Gray*, 1.
Piscataqua Bridge v. *New Hampshire Bridge*, 7 *N. H.* 35.

The legislature may grant to a corporation immunity from taxation with a view to encourage a public enterprise, and by such grants bind its successors.

Ohio Loan & Trust Co. v. *Debolt*, 16 *Howard*, 410.
Wilmington Railroad v. *Reid*, 13 *Wallace*, 264.
Humphreys v. *Pegues*, 16 *Wallace*, 244.
Piqua Bank v. *Knox*, 16 *Howard*, 369.
Dodge v. *Woolsey*, 18 *Howard*, 331.
New Jersey v. *Yard*, 95 *U. S.* 104.
Farrington v. *Tennessee*, 95 *U. S.* 679.

It is conceded that if the State Constitution prohibits the surrender of any portion of its sovereign authority, an attempt by the legislature to make such surrender would

be abortive. For the contract so to do would not be binding for want of authority of the agent, that is to say, the legislature. But no such prohibition is found in the Constitution of Massachusetts.

Upon this point, the case of the Boston and Lowell Railroad *v.* Salem and Lowell Railroad is conclusive. The Court held that the legislature, having granted to the plaintiff corporation the exclusive right to construct their road between two certain *termini*, no other corporation could be authorized to construct a road between them.

Chief-Justice Shaw defines the police power to be "the power vested in the legislature by the Constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and the subjects of the same."

Commonwealth v. *Alger*, 7 *Cush.*

If this be a correct definition, the power to impose taxes is clearly a police power; and if the legislature may part with this power, why may it not with any other police power?

Second. Was the franchise of the corporation, granted in 1828, made irrevocable?

The Boston Beer Company was incorporated "for the purpose of manufacturing malt liquors in all their varieties in the city of Boston, and for that purpose was to have all the powers and privileges and be subject to all the duties and requirements contained in an Act passed March 3, 1809." This statute defines the general powers of manufacturing corporations, and makes the stockholders liable personally for the debts of the corporation. Sect. 7 contains this proviso: "Provided always that the legislature may

from time to time, *upon due notice to any corporation*, make further provisions and regulations for the management of the business of the corporation and for the government thereof, or wholly to repeal any act or part thereof, establishing any corporation, as shall be deemed expedient."

By Statute 1829, Ch. 53, Sect. 16, this Act of 1809 and all Acts in addition thereto were repealed, with this qualification, "But this repeal shall not affect the existing rights of any persons or the existing or future liabilities of any corporation, or any members of any corporation now established, until such corporation shall have adopted this Act and complied with the provisions herein contained." Section 17 declares that this Act may be amended or repealed at the pleasure of the legislature, and all such corporations as shall be established under this Act, or shall adopt the same in the manner herein prescribed, shall cease and expire at the same time when this Act shall be repealed: *Provided, however*, that nothing herein contained shall take away or affect any remedy given by this Act against any such corporation, its members or officers, for any liability which shall have been created by the provisions herein contained before the repeal of this Act.

By the Revised Statutes, Ch. 146, Sect. 3, this last mentioned Act was repealed; but this repeal did not revive the Act of 1809, for Ch. 146, Sect. 9, of the Revised Statutes declares that no Act which has been heretofore repealed shall be revived by the repeal contained in this chapter of any of the Acts hereinbefore mentioned.

The seventh section of the Act of 1809 is restricted, both by its terms and its subject matter, to action by the legislature, *after notice*, upon the charter itself. General legislation, had without notice to the corporation and without action upon the specific grant made by its charter, is clearly not within the provision. In a somewhat similar case, People *v.* Platt, 17 Johnson, 215, it was deemed most

respectful to the legislature to assume that in enacting a general law which would impair a grant, if allowed to operate thereon, the legislature did not have the particular grant in view and did not intend to impair it. But whatever supposition may be resorted to, it is clear that the provisions of the Act of 1869 cannot be deemed to be within "a further regulation for the management of the business of the plaintiff corporation or a repeal of the charter upon *due notice* to the corporation."

The Act of 1829, Ch. 53, Sect. 16, repealed the entire Act of 1809, subject only to the qualification, "but this repeal shall not affect the existing rights of any persons, or the existing or future liabilities of any corporation, or any members of any corporation now established, until such corporation shall have adopted this Act and complied with the provisions herein contained."

This qualification has no reference to the subject matter of the seventh section of the Act of 1809, but relates exclusively to the rights of persons against the corporation and its members, which it was one object of the Act to modify, if it should be accepted and its terms complied with by any then existing corporation. The language is wholly satisfied by such a construction and its terms can properly imply nothing more. "The rights of any persons or the existing or future liabilities of any corporation" have a natural and appropriate meaning when applied to the rights of third persons and the corresponding liabilities to third persons, of the corporation and its members, but clearly do not fitly describe or indicate a power of the legislature to alter, amend or repeal a charter.

Subsequent legislation strongly tends to confirm this view. It should be observed that by the seventeenth section of the Act of 1829, the only power reserved by the legislature over the charters of corporations established under or adopting that Act, was a power to sweep them all out of existence by a

repeal of that Act itself. There was no power reserved to alter or amend a charter or to repeal any one charter.

This defect having been discovered, as it would seem, March 11, 1831, the statute of that date, Chap. 81 was passed, which declared that all Acts of incorporation passed *after that date* should be subject to be amended, altered, or repealed at the pleasure of the legislature. When the Revised Statutes were enacted, and subsequently when the General Statutes were enacted, the legislative power over corporations was declared to extend to those created after March 11, 1831. (Revised Statutes, Chap. 38, Sect. 36; General Statutes, Chap. 68, Sect. 41.) And there is no trace of any other claim of authority from the time when the Act of 1809 was repealed by the Act of 1829, Chap. 53. These provisions in the Revised and General Statutes must be taken to be well considered statements of the whole authority claimed by the legislature, to repeal or alter or amend charters before granted; and as it is expressly limited to those corporations created since March 11, 1831, such limitation shows that it was at that date and by virtue of the Act then passed that this power was called into existence, and that as to corporations previously created no such power existed.

When the grant to the plaintiff corporation was originally made it was subject to a reservation, by force of which it might be modified or revoked after due notice to the corporation. By subsequent legislation, this reservation was relinquished. By this relinquishment, the grant, which was originally revocable in part or in whole, became irrevocable in part or in whole. The original qualification of the grant which affected the obligation of the contract arising from it was removed, the grant became absolute, and the obligation of the contract arising from it was thenceforward unqualified. The effect of such a relinquishment of a power of revocation or alteration in case of private grants would not admit of doubt. Once effectually made, the relinquishment of a

power over property is a final extinguishment of the power, and can never be resumed. The reason why the State cannot resume franchises absolutely granted, is that such resumption derogates from the grant and thus impairs the obligation of the contract arising from the grant. If the charter of the plaintiff corporation had contained a section substantially like the seventh section of the statute of 1809, and subsequently the legislature had repealed that section, would the grant be other than it would have been if the charter had not originally contained the repealed section? Can it make any difference whether the grant and the reservation are in one or two Acts?

The State Court did not consider this question, as it held that even where the charter cannot be altered or repealed by the legislature, the Act of 1869 did not violate the obligation of the contract.

Third. What is the franchise of the plaintiff corporation? What powers, privileges, and immunities were conferred on it by its charter?

By Sect. 1 of the Act of February 1, 1828, it was enacted that Gamaliel Bradford, and several others named, "with such other persons as are or may become associates with them, their successors and assigns, be and they hereby are made a corporation by the name of the Boston Beer Company, for the purpose of manufacturing malt liquors in all their varieties in the city of Boston, etc." By Sect. 2 said corporation may hold and possess such real estate, not exceeding in value the sum of fifty thousand dollars, and such personal estate, not exceeding one hundred thousand dollars, as may be found necessary and convenient for carrying on the manufacture of malt liquors in the city of Boston.

The power to sell is not expressly given to the corporation. But is not the power to sell as clearly given as if it were expressed? Did the legislature suppose it was only

authorizing the corporators to invest a capital of one hundred and fifty thousand dollars for the manufacture of malt liquors to be consumed by themselves?

To carry on this manufacturing business, the corporation must sell its products. It was not only necessary it should have the power to sell, it was indispensable. Without this power, the charter would have been utterly worthless, the enterprise would have been impracticable.

In Huidekooper, Lessee *v.* Douglass, 3 Crauch. 1, in speaking of a legislative grant, the Court says, "This is a contract, and although the State is a party, it ought to be construed according to those well-settled principles which regulate contracts generally."

When a thing is granted, the law giveth impliedly whatever is necessary for the taking and enjoying the same.

Coke, Littleton, 56; *Sheppard, Touchstone*, 49.
Thayer v. *Payne*, 2 *Cush.* 327.

When the use is granted, everything is granted by which the grantee may have and enjoy this use.

Pomfret v. *Ricropt*, 1 *Saunders*, 321.

What is implied in a statute or contract is as much a part of it as what is expressed.

United States v. *Babbitt*, 1 *Black*, 61.

"A corporation once organized has the implied power to make contracts connected with its business."

"A power to dispose of its notes by a bank of discount, as well as of other property, may well be regarded as an incident to its business, as well as an incident to its right of holding them when no express limitation is imposed on the authority to transfer them."

Planters' Bank v. *Grant*, 6 *Howard*, 318.

It was provided in the charter of a bank, by the legislature of Tennessee, that the bank "shall pay to the State an annual tax of one half of one per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes." It was held that a subsequent revenue law of the State, imposing an additional tax *on the shares in the hands of stockholders*, impairs the obligation of the contract, though there was no express exemption of the *shareholders* in the Act of incorporation.

Farrington v. *Tennessee*, 95 *U. S.* 679.

The Court when announcing the doctrine that grants by the State were to be construed strictly, and that nothing is to be construed as granted by implication, was dealing with quite another question. The question was not whether the State granted by implication what was essential to the enjoyment of the grant expressly made, but whether it impliedly covenanted not to grant a like privilege to another, or to bestow a bounty in the shape of an exemption from this common burden of taxation.

This is not an attempt to restrain the setting up of a rival establishment for the manufacture of malt liquor in the same city, whereby its profits might be diminished, or to secure immunity from taxation, but an effort to secure the enjoyment of a right incident to the right expressly granted, the right to dispose of its property, which right is an essential element of property. If the legislature were to create a corporation for the manufacture of cotton cloths, can it be doubted that the corporation, with the right to manufacture, would take the right to sell its cloths?

If the legislature were to create a corporation with express power to locate, construct, equip and run a railroad for the transportation of passengers and merchandise, for reasonable fares and freights, would not the company be authorized to draw its cars by steam power, though no right

to use steam were expressly granted? And would not a general law prohibiting the use of steam on railroads violate the obligation of the contract contained in the grant? Would not the company be held to have acquired by its charter the right to avail of the means and appliances in universal use at the date of its charter?

If this corporation acquired by its charter the right to sell its products, it must have had the right to sell in the usual course of business then legitimate.

It might, then, have sold malt liquor as a beverage; it might have sold it in retail or by wholesale; it might have exported and sold it in any quantity in other States or in foreign countries.

It is conceded that the legislature may still make all reasonable regulations, providing a material and essential part of the grant is not impaired.

People v. *Platt*, 17 *Johnson*, 215.

The limit to the exercise of the police power must be this: The regulations must have reference to the comfort, safety and welfare of society. They must not conflict with any provisions of the charter; and they must not, under pretence of regulating, take from the corporation any of its essential rights and privileges which the charter confers.

Cooley's Constitutional Limitations, 576, *and cases there cited.*

It is conceded that the powers expressly or by *necessary implication conferred* by the charter, and which are essential to the successful operation of the corporation, are inviolable. Any Act substantially paralyzing the franchise or destroying the profits arising therefrom would, no doubt, be void.

Thorpe v. *Burlington & Rutland R. R.*, 27 *Vermont*, 140.

This was the consideration which induced the acceptance of the grant. Upon this consideration the corporators furnished the capital and incurred the expenses necessary to the establishment of their manufactory.

Fourth. If, by the Act of incorporation and the acceptance thereof, the company acquired the right to sell as well as to manufacture, the only inquiry is, Has this right been materially or essentially impaired? It will hardly be denied that if the statute of 1869 had utterly forbidden the sale by the corporation, it would have violated the obligations of the contract. Conceding the right of the legislature to impose regulations upon the sale, it is apparent that the statute of 1869 goes much further, and in part defeats the object had in view by both parties to the contract, in short, paralyzes the franchise.

By Section 30, the corporation is expressly forbidden "to manufacture for sale, or directly or indirectly to sell its products unless authorized as provided in other sections of the Act."

By Section 12 the mayor and aldermen of cities and the selectmen of towns *may* authorize such persons as apply in writing to manufacture at places within their jurisdiction, and to sell in quantities not less than thirty gallons, to be exported or to be used in the arts, or for mechanical or chemical purposes; which authority shall continue for one year, unless sooner revoked.

By Section 13 the applicant is not to receive his certificate until he shall have executed, with two sureties, a bond in the penal sum of $6,000; which bond is to recite that "he has been authorized to manufacture and sell in quantities not less than thirty gallons, to be exported or used in the arts, or for mechanical or chemical purposes, and *in any quantity to city or town agents as provided by law.*"

By Section 17 the selectmen of every town of less than five thousand inhabitants, may, and the mayor and aldermen of

every city, and the selectmen of every town of more than five thousand inhabitants shall, appoint one or more suitable persons, as agents for one year, to purchase and sell spirituous and intoxicating liquors to be used in the arts or for medicinal, chemical and mechanical purposes and no other.

By Section 1 the governor, by and with advice of council, shall appoint a competent person as commissioner to purchase liquors of pure quality, and to sell them to city and town agents appointed by the mayor and aldermen of cities and selectmen of towns, and to the regularly appointed city and town agents in the other New England States.

By Section 21, each city and town agent shall purchase of the commissioner appointed under Section 1 *all liquors to be sold by him;* and if he shall purchase of any other person, shall be liable to the pains and penalties provided in Section 33. While, therefore, it might be inferred from the recital in the bond to be given by the licensed manufacturer that he was authorized by his certificate to sell to the city and town agents, it is clear that they cannot purchase of him. They can purchase only of the commissioner. In order that this corporation may manufacture for sale, it must be so fortunate as to obtain a license, which may at any moment be revoked; and while it holds a license, it can only sell in quantities not less than thirty gallons, to be exported or to be used in the arts or for mechanical or chemical purposes. It cannot, if the Act of 1869 is enforced, sell malt liquors to be used as a beverage; it cannot dispose of its products by retail; it cannot export them in any quantities for sale in other States or foreign countries. It may sell within the State to be exported in quantities not less than thirty gallons, or to be used in the arts or for mechanical or chemical purposes, — uses and purposes, by the way, for which malt liquors are never wanted.

Is it not clear that the enforcement of this statute would utterly destroy the franchise?

In 1828 it was the policy of the State to encourage the manufacture of malt liquors.

Section 50 of the Act of 1869 prohibits the manufacture for sale, without license, of spirituous or intoxicating liquor, and declares that ale, porter, strong beer, lager bier, and all wines shall be considered intoxicating, within the meaning of this Act.

In 1870, Section 30 of the Act of 1869 was amended by striking therefrom the words "ale, porter, strong beer, lager bier."

In 1871, Section 30 of the Act of 1869 was again amended by replacing these words.

The framers of the Constitution were wise in providing that no State should pass any law impairing the obligation of contracts.

The plaintiff does not invoke the aid of the fourteenth amendment.

HENRY W. PAINE.
FREDERICK O. PRINCE.

Supreme Court of the United States.

No. 277.

THE BOSTON BEER COMPANY,

CLAIMANT OF CERTAIN INTOXICATING LIQUORS, PLAINTIFF IN ERROR,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR

THE DEFENDANT IN ERROR.

BOSTON:
Rand, Avery, & Co., Printers to the Commonwealth,
117 Franklin Street.
1878.

Supreme Court of the United States.

No. 277.

THE BOSTON BEER COMPANY, CLAIMANT OF CERTAIN INTOXICATING LIQUORS, PLAINTIFF IN ERROR,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

Abstract of the Record: —

1. A complaint in the Municipal Court, alleging that certain liquor was kept for the purpose of being sold by a person unknown "in violation of the 415th chapter of the Statutes of the year of our Lord eighteen hundred and sixty-nine of said Commonwealth, and [that] said liquor has been sold in said Commonwealth in violation of said chapter," praying for process and for a declaration that said liquor be forfeited.

2. Process issued thereon and seizure of certain liquor. Appearance of plaintiff in error as claimant of the liquor seized.

3. Plea by the plaintiff in error, alleging that it was made a corporation by St. 1827, *c.* 32, "for the purpose of manufacturing malt liquors in all their varieties in the city of Boston," "and for that purpose" was invested with all "the powers and privileges and was subject to all the duties and requirements contained" in St. 1808, *c.* 65; that St. 1808, *c.* 65, reserved to the legislature power of amending or repealing the charter; but that St. 1808 was repealed by St. 1829, *c.* 53; that the charter of this corporation thereby

became irrepealable; and, therefore, that St. 1869, *c.* 415, is not applicable to this corporation. Judgment that the plea was bad.

4. Trial of the truth of the allegations of the complaint, and determination that they were true. Decree that the liquor be forfeited.

5. Appeal to the Superior Court, and entry of complaint therein.

6. Trial in the Superior Court on the following issue: "Whether any part, and if so, what part of the liquors described in the complaint was, at the time of the making of the complaint, owned and kept by the parties named in said complaint, for the purpose of being sold contrary to the provisions of chapter 415 of the Acts of 1869 of the General Court of this Commonwealth, as alleged in said complaint." Verdict in favor of the Commonwealth.

7. Bill of exceptions setting forth that the court refused, on request of plaintiff in error, to instruct the jury that the legislature, for the reasons set forth in the plea *supra*, had relinquished its reserved power of amending the charter of the plaintiff in error; and that by reason thereof the plaintiff in error was not subject to St. 1869, *c.* 415.

8. Judgment of the Supreme Judicial Court overruling the exceptions; and judgment by the Superior Court that the liquor be declared forfeited.

Abstract of St. 1869, *c.* 415: —

§§ 1 – 11. A commissioner shall be appointed to sell pure intoxicating liquor to city and town agents.

§§ 17 – 24. City and town agents shall be appointed to sell intoxicating liquor "to be used in the arts or for medicinal, chemical, and mechanical purposes," which liquor shall be purchased of the commissioner.

§§ 12 – 15. Persons may be licensed to manufacture intoxicating liquors for the purpose of selling them in quantities not less than thirty gallons: (1) to be exported; (2) to be used in the arts; (3) for mechanical, or (4) chemical purposes; (5) to be used by city or town agents (see condition of bond § 13).

§§ 27 – 30. No person shall sell intoxicating liquor except: (1) imported liquor in original packages; (2) cider not to be drunk on the premises; (3) except that druggists may sell to other drug-

gists, physicians, and apothecaries; (4) except for sacramental purposes. No person shall keep intoxicating liquor, except: (1) for the purpose of selling as above allowed, except (2) that chemists, artists, or manufacturers may keep for use.

§§ 31 – 43. Penalties for sale.

§§ 44 – 57. Intoxicationg liquor kept for sale in violation of this act may be seized and declared forfeited.

§ 30. Ale, porter, strong beer, lager beer, and all wines shall be considered intoxicating within the meaning of this act.

Abstract of the Charter of the Boston Beer Company, i.e. St 1827 *c.* 32:—

J. S. et al., are "hereby made a corporation by the name of the Boston Beer Company for the purpose of manufacturing malt liquors in all their varieties in the city of Boston, and for that purpose shall have all the powers and privileges and be subject to all the duties and requirements contained" in St. 1808, *c.* 65.

St. 1808, *c.* 65, is an act defining the general powers and duties of manufacturing corporations "which may hereafter be established within this Commonwealth." § 7 reserves to the legislature power of repeal and amendment.

First Point.

This record does not raise the question, whether or not the provisions of St. 1869, *c.* 415, are in violation of the plaintiff in error's charter.

I.

There are two ways only in which that question can be raised, to wit:—

1. Before judgment by plea, setting forth the charter.

2. After judgment, by a writ of error in fact, assigning for error the provisions of the charter.

II.

The question is not raised on this record by the plea made in the Municipal Court; that plea was waived in that court by denying

the truth of the complaint, and going to trial on that issue, and was not renewed in the Superior Court.

It is clear that a party in a criminal case waives a plea, by pleading over to the truth of the complaint. A proceeding for forfeiture is a criminal proceeding (*Commonwealth* v. *Intoxicating Liquors, Rodney Brown, Claimant*, 115 Mass., 142), and a claimant is in every sense a party (*Commonwealth* v. *Intoxicating Liquors, John Ganey, Claimant*, 122 Mass., 8).

The course which the trial took in the appellate court shows that the issue raised by the plea was not carried up by the appeal.

III.

The question was not raised by the request for instructions to the jury.

The duty of the jury was to determine the issue of fact presented to them, and nothing more.

Wells v. *Abrahams*, L. R. 7 Q. B., 554.
Draper v. *Ellis*, 12 Iowa, 316.
Allen v. *Parkhurst*, 10 Vt., 557.
Lumby v. *Allday*, 1 Ct. & Jer., 301.
Bas v. *Steel*, Peters C. C., 406.

In the case at bar, the issue was this: Were the liquors in question kept to be sold in violation of St. 1869, *c.* 415?

Therefore, the fact (if it was a fact) that St. 1869, *c.* 415, was a violation of the plaintiff in error's charter, and therefore *quoad* the plaintiff corporation was unconstitutional, could not be taken into consideration by the jury: it did not affect the truth or falsity of the issue. It did not show that the liquor was not kept for sale in violation of St. 1869: it only showed, that, if the liquor was kept for sale by the plaintiff corporation in violation of St. 1869, *c.* 415, no judgment of forfeiture could be rendered against the liquor.

IV.

The statement in the bill of exceptions that the jury found certain facts, and among them the provisions of the plaintiff's charter, must be rejected as repugnant to the rest of the record. It is repugnant to the issue submitted to the jury, and to the verdict set out in the record of the Superior Court as returned by the jury.

V.

The fact, that the opinion of the court below, shows that a federal question was considered, is not decisive of the question, whether a federal question was raised by the record.

Moore v. *Mississippi*, 21 Wall, 636.

Second Point.

St. 1869, *c.* 415, does not violate the obligations of the contract contained in the plaintiff's charter.

First Ground.

The plaintiff's charter is repealable and amendable.

I.

The powers and privileges, duties and requirements, of the plaintiff corporation continued to be, after the repeal by St. 1829, *c.* 53, § 16, of St. 1808, *c.* 65, those set forth in St. 1808, *c.* 65, precisely as they were before the repeal of that act; because:

1st. It is by force of the provisions of the charter (St. 1827, *c.* 32) that those duties are the duties of the plaintiff corporation; the charter (St. 1827, *c.* 32, § 1) provides that this corporation shall have certain powers, &c.; to wit, those powers, &c., which are set forth in a certain instrument; to wit, St. 1808, *c.* 65. It was originally entirely immaterial that St. 1808 was a statute; and it is now entirely immaterial that it has ceased to be so. It was by force of the charter that those powers, &c., are the powers, &c., of this corporation; the charter has not been repealed.

2d. The proviso in St. 1829, *c.* 53, § 16, is a clumsy saving clause, providing that the repeal of St. 1808, *c.* 65, should not affect existing corporations until they adopted this act.

3d. It is impossible to give to the repeal of St. 1808, *c.* 65, the effect contended for by the plaintiff in error.

The legislature has assumed that such is not its effect. See St. 1871, *c.* 110, § 5, providing that corporations, subject to the provisions of St. 1808, *c.* 65, shall make certain returns.

It is directly contrary to the uniform course of Massachusetts legislation on the subject. See St. 1808, *c.* 65; St. 1829, *c.* 53; Rev. Sts., *c.* 38; Gen. Sts., *c.* 60; St. 1870, *c.* 224.

II.

If the plaintiff's charter is amendable and repealable, the corporation is subject to the same restraints in the use of its property, as may be imposed by the legislature, in the exercise of the police power, upon natural persons.

Peik v. *Chicago Railway Co.*, 94 U. S., 164.

And it is confessedly within the police power of the State to prohibit the manufacture of intoxicating liquor.

Bartemeyer v. *Iowa*, 18 Wall, 129, 133.

SECOND GROUND.

Assuming that the plaintiff's charter is not repealable, the obligation of the contract contained therein is not impaired, because: The plaintiff's charter cannot be construed to contain a contract between the State of Massachusetts and the plaintiff corporation, that its right of manufacturing malt liquors should be absolute, and not subject to be limited by restraints imposed in the exercise of the police power.

It is clear that if the plaintiff's charter does not contain such a contract, St. 1869, *c.* 415, does not violate its obligations; for it is clear that the restraints imposed on the manufacture of liquor by St. 1869, *c.* 415 are such as can be legitimately imposed in the exercise of the police power. *Bartemeyer* v. *Iowa*, *ubi supra*.

There are two reasons why the plaintiff's charter cannot be so construed: (first) because the language cannot be so interpreted; (second) because it was beyond the authority of the legislature to make such a contract.

First.

The language of the charter cannot be interpreted to provide that the plaintiff corporation's right of manufacturing malt liquor shall be absolute, and not subject to be restrained by the State and future legislatures in the exercise of the police power.

I.

The rule of interpretation to be applied is this: no "power of sovereignty, which the community have an interest in preserving undiminished, will be held by the court to be surrendered, unless the intention to surrender is manifested by words too plain to be mistaken."

Taney, C. J., in *Ohio Life Ins. Co.* v. *Debolt*, 16 How., 416, 435.
Opinion of the Justices, 9 Cush., 604, 612.
Farrington v. *Tennessee*, S. C. of U. S., Oct. Term, 1877, 17 Albany Law Journal, 128.
West Wisconsin Railroad v. *Supervisors*, 93 U. S., 595, 598.
Thorpe v. *Rutland and Burlington Railroad*, 27 Vt, 142.

II.

It is clear that this charter does not provide, in words too plain to be mistaken, that future legislatures shall not, in the exercise of the police power, restrain this corporation in the matter of manufacturing malt liquors.

The words, "for the purpose of manufacturing malt liquors in all their varieties" were inserted to provide that the corporators should not have corporate powers for any other purpose; that they should be a corporation for that purpose and for that purpose only. It is the invariable rule in Massachusetts, as well as in other jurisdictions, to limit the purposes for which corporators shall have corporate powers.

This corporation was, when created, subject to St. 1786, *c.* 68 (then in force), regulating the sale of the liquor manufactured by it. What words of the charter provide that it shall not be subject to the regulations which should be substituted for those of St. 1786? *Commonwealth* v. *Hamilton Mfg. Co.*, 120 Mass., 383, 384.

It is submitted that this charter cannot be construed to exempt the plaintiff from the operation of the police power without over-

ruling *Providence Bank* v. *Billings*, 4 Pet., 514. In both cases the sovereign power in question could be wielded to destroy the grant. In neither case was it so wielded; but in both it was so wielded, that the grant was less valuable after it was exercised than it was before.

III.

Further, it is submitted that the question of interpretation, as it is stated in II., is stated too favorably for the plaintiff in error. The question really is: Does the charter provide in words too plain to be mistaken that the State of Massachusetts will never thereafter pass a prohibitory liquor law? That is the real question, because:

1. A law restraining a subject in his property, immunities, or privileges, which does not operate equally on all subjects in like circumstances, is not a "law of the land" within Art. XII. of Mass. Declaration of Rights.

Simonds v. *Simonds*, 103 Mass., 572.
Holden v. *James*, 11 Mass., 396.
In re Picquet, 5 Pick., 65.
Lewis v. *Webb*, 3 Greenleaf, 326.
Durkee v. *Janesville*, 28 Wisc., 464.
Johnson, J., in *Bank of Columbia* v. *Okely*, 4 Wheat., 235, 244.
Webster *arg.* in *Dartmouth College* v. *Woodward*, 5 Webster's Works, 487.
Reese, J., in *Budd* v. *State*, 3 Humph., 483, 490–492.
Cooley Const. Lim., 2d ed., 391.
Sedgwick on Statutory and Const. Law, 177.

2. It is, therefore, clear, that it is not within the constitutional power of the legislature to prohibit one subject from manufacturing liquor without prohibiting all; and a contract not to prohibit one subject is a contract to prohibit none, or it is no contract at all.

SECOND.

It was beyond the power of the legislature to make a contract, binding on the State of Massachusetts that future legislatures would not exercise the police power, so as to limit the plaintiff corporation in the matter of manufacturing malt liquors.

I.

The question whether such a contract is or is not within the power of the legislature, is a question of the construction of the Constitution of Massachusetts.

II.

The Constitution of Massachusetts cannot be construed to authorize the legislature to make such a contract.

1. The State court has expressed the opinion that the Constitution does not authorize the legislature to abridge the sovereign power of the State in any way.

Commonwealth v. *Bird*, 12 Mass., 443, 446.
Boston & Lowell Railroad v. *Salem & Lowell Railroad*, 2 Gray, 1, 32.
Eastern Railroad v. *Boston & Maine Railroad*, 111 Mass., 125, 131.

2. The construction of the State court is clearly correct.

1. The legislature acts in two separate characters.

1st. As the body to which the State has delegated the (sovereign) law-making power.

2d. As the body which represents the State in the matter of its public property.

When the legislature is acting in the second of these characters it can contract, sell, or grant as an individual can, and its action is binding on the State.

But in its first capacity, and as regards the law-making power, the legislature can enter into no contract binding on the State. The law-making power is given to the legislature by the State to be exercised as it "shall judge to be for the good and welfare of this Commonwealth," and in a way "not repugnant or contrary to this Constitution." Mass. Const., Part II., *c.* I., § 1, Art. IV. The Constitution expressly provides that the people of Massachusetts are, and shall forever thereafter be, sovereign, and have an indefeasible right to alter or totally change their government when their protection, safety, prosperity, or happiness requires it. Preamble; and Part I.,

Art. IV., and Art. VII. And, were the Constitution entirely silent on this point, the result would be the same: it could not be presumed that a sovereign people intended to give its delegate and creature power to destroy their sovereignty.

In granting corporate franchises, the legislature acts in its second character; corporate franchises are property; and consequently the action of the legislature in regard to them can be made binding on the State and future legislatures.

But it by no means follows that every provision placed in a charter is binding on the State and future legislatures. It would be precisely as reasonable to contend that every provision put in a deed conveying public land was binding on the State and future legislatures; to contend that if, in a deed conveying public land, there was a provision to the effect that the land should always be used as a burying-ground (as in *Brick Presbyterian Church* v. *New York*, 5 Cowen, 588, and in *Coates* v. *New York*, 7 Cowen, 585), or as a powder-magazine, or a small-pox hospital, that provision would be binding on the State and future legislatures.

If the distinction here contended for, between the power of the legislature in regard to the law-making power and other sovereign powers on the one hand, and in regard to the property of the public on the other, is a sound distinction, it is clear that that provision of the charter of the Boston Beer Co. is not binding on the State, which declares that its right of manufacturing malt liquors shall not be limited by restraints imposed by future legislatures in the exercise of the police power.

This distinction is sound: —

Boston & Lowell Railroad v. *Salem & Lowell Railroad*, *ubi supra*.

Piscataqua Bridge v. *New Hampshire Bridge*, 7 N. H., 35, 62.

Brewster v. *Hough*, 10 N. H., 138, 146.

Brick Presbyterian Church v. *New York*, *ubi supra*, 450.

On this distinction, such cases as *The Binghamton Bridge*, 3 Wall., 51, are well decided; in contracting that a person shall have the exclusive right to maintain a bridge, and in providing for internal improvements generally, the legislature is dealing with the public's rights of property; it is not making laws; i.e., it is not regulating

the rights and duties of subjects *inter sese* and towards the public. See *Boston & Lowell Railroad* v. *Salem & Lowell Railroad*, *ubi supra*; *State* v. *Noyes*, 47 Maine, 189.

And on the other hand, on this distinction, cases holding that licenses to sell liquor are revoked by the enactment of a prohibitory law, are (if a license is to be construed to be a privilege to sell liquor) well decided.

Metropolitan Board v. *Barrie*, 34 N.Y., 657.
Hirn v. *Ohio*, 1 Ohio St., 15.

But the better opinion is (it is submitted) that a liquor license is not a privilege to sell liquor; it is merely the privilege of being exempt from the restraints of the law to which the licensee would otherwise be subject. See Gibson, C. J., in *Monongahela Navigation Co.* v. *Coons*, 6 W. & S., 101, 112–118; Bigelow, C. J. (*semble*), in *Calder* v. *Kurby*, 5 Gray, 597, 598; *Metropolitan Board* v. *Barrie*, *ubi supra*, 667.

Whether on this distinction *Moore* v. *State*, 48 Miss., 147, and *State* v. *Morris*, 77 N. C., 512, are well decided or not, it is not necessary to consider.

The only thing which throws doubt on this distinction is the proposition that if a State legislature agrees to exempt a corporation from paying taxes, that agreement is binding on the State.

That proposition is *res judicata*.

New Jersey v. *Wilson*, 7 Cranch, 164.
Gordon v. *Appeal Tax-Court*, 3 How., 133.
Piqua Bank v. *Knoop*, 16 How., 369.
Ohio Life & Trust Company v. *Debolt*, 16 How., 416.
Dodge v. *Woolsey*, 18 How., 331.
Jefferson Branch Bank v. *Skelly*, 1 Black., 436.
Home of the Friendless v. *Rouse*, 8 Wall., 430.
Wilmington Railroad v. *Reid*, 13 Wall., 264.
Humphrey v *Pegues*, 16 Wall., 244.

But it is respectfully submitted, that, if the reasoning is considered by which that conclusion was reached in the above cases, the fact that this conclusion is *res judicata* cannot be held to be conclusive against the distinction here contended for.

In the first two cases the point passed into decision *sub silentio*.

It was first discussed in *Piqua Bank* v. *Knoop*; and in *Ohio Life Ins. and Trust Co.* v. *Debolt*.

In *Piqua Bank* v. *Knoop* it was held; (1) that the charter of the plaintiff bank did, as matter of interpretation, contain a contract that the bank should be exempt from taxation; (2) that that contract was binding on the State; Catron, Daniel, and Campbell, J. J., dissenting. The opinion of the court was delivered by McLean, J.; Taney, C. J., dissented from the reasoning on which the second proposition was maintained, and referred to his own opinion in *Ohio Life Ins. and Trust Co.* v. *Debolt* for the grounds on which he held that that proposition was law. Catron and Daniel, J. J., held that both propositions were not law. Campbell, J., denied the first, and stated that he expressed no opinion on the second.

In *Ohio Life Ins. and Trust Co.* v. *Debolt* it was held that there was no contract between the State and the plaintiff corporation that it should be exempt from taxation; McLean, Wayne, Nelson, and Curtis, J. J., dissenting. There was no opinion of the court. Taney, C. J., and Grier, J., held; (1) that, if there had been such a contract, it would have been binding; but (2) that, as matter of interpretation, there was no such contract. Campbell concurred in the second of these propositions, and stated that he expressed no opinion on the first. Catron and Daniel, J. J., held that such a contract would not have been binding, and that, as matter of interpretation, there was no such contract. Curtis and Nelson, J. J., dissented on the ground that, as matter of interpretation, there was such a contract, and that it was binding on the State for the reasons given by Taney, C. J.

The reasoning on which McLean, J., held this contract binding on the State was as follows:—

Pages 383–384. The assumption that the State, in exempting property from taxation, relinquishes any part of its sovereignty, is of modern growth, and is unfounded.

386–389. It is settled that a State can bind itself by contract: *New Jersey* v. *Wilson; London* v. *Appeal Tax Court; Dartmouth College* v. *Woodward*, 4 *Wheat.*, 518; *Terrett* v. *Taylor*, 9 Cranch, 43; *Town of Pawlett* v. *Clark*, id., 292.

389. No one ever contended that a State could barter away part of its sovereignty; a contract exempting property from taxation for a limited period is an exercise of sovereign power, not a parting with sovereign power.

Of this reasoning it is to be observed: 1st. That there is a distinction between exempting property from taxation and making a contract, binding on the State for a term of years, to

exempt property from taxation; the former is the exercise of sovereign power, the latter is a parting with a portion of sovereign power. 2d. That the cases cited, in which it was decided that a contract made by the legislature was binding on the State, were cases of contracts as to the public property, not as to sovereign power; and, lastly (and this is the most important observation), the real question on which all these cases hinge was not considered at all in this opinion. It may be conceded that a State can by contract abridge its sovereign power; but in all these cases it is the legislature, and not the State, which makes the contract; the vital question, therefore, is, conceding that the State can do so, has the State authorized its delegate, the legislature, to do so. Now, throughout the opinion it is assumed by McLean, J., that the contract made was made by the State; and the difference between the power of the State and the power of the legislature, the delegate of the State, is nowhere alluded to.

In short, it may be fairly stated of this opinion, not only that its reasoning is unsound, but that it did not take into consideration the question now under consideration, and which it has always been considered to have decided, to wit: has the legislature authority to abridge the State's sovereign power by contracting that property shall be exempt from taxation for a term of years?

This question was considered by Taney, C. J., and his reasoning is the argument put forward in this brief. It was as follows:—

The State is sovereign, and the legislature is its delegate, appointed by the Constitution.

The State may abridge its sovereign power of taxation, and may authorize its delegate to do so.

But in all the cases where it is claimed that a State legislature has made a contract, binding on the State, exempting property from taxation for a term of years, the question whether or not there is such a contract depends upon the extent of power conferred on that legislature by the Constitution of that State.

Prima facie, since the sovereign power is confided as a trust to be exercised for the common good, the legislature has no such authority.

But that, in this case, the action of the legislature of Ohio is binding on the State of Ohio, because, up to the time when it was granted, the Constitution of Ohio had been uniformly construed by the State authorities to authorize such a contract. In other words,

this contract was held binding on the principle since elaborated in *Gelpecke* v. *Dubuque*, 1 Wall., 175.

Piqua Bank v. *Knoop*, then, decides nothing more than this: The Constitution of Ohio, so far as this and similar charters are concerned, must be construed to authorize the legislature of that State to make a contract exempting property from taxation. It is true that, in the opinion of the Court, the decision is put on the ground that all State legislatures could make such contracts binding on the State, but this was an expression of opinion on the part of McLean, J., and no part of the point decided (Thomas, J., in *Beal* v. *Warren*, 2 Gray, 447, 459); and no one of the judges, except Wayne, J., concurred in this expression of opinion. Taney, C. J., Campbell, Catron, and Daniel, J. J., expressly stated that they did not concur in that expression of opinion; and, inasmuch as in the case of *Ohio Life Ins. and Trust Company* v. *Debolt*, Grier, J., entirely concurred in the opinion of the Chief Justice, and Nelson and Curtis, J. J., concurred with him as to the power of the legislature of Ohio to make the contract, and as to the propriety of accepting the construction of the Constitution of the State, which had been acquiesced in by the people for many years, when this contract was made, it cannot be supposed that they concurred in this expression of opinion on the part of McLean, J., in *Piqua Bank* v. *Knoop*.

The cases of *Dodge* v. *Woolsey* and *Jefferson Branch Bank* v. *Skelly* were cases of corporations having precisely similar charters to that of the *Piqua Bank* v. *Knoop:* they were, consequently, rightly held to be governed by that decision, and not to require any discussion of the general question.

Then came the case of the *Home of the Friendless* v. *Rouse*. In that case it was held that a Missouri charter, exempting the plaintiff corporation from taxation, was a contract binding on the State and future legislatures, — Chase, C. J., Miller and Field, J. J., dissenting. The only reason given for the decision was that *Piqua Bank* v. *Knoop* had definitely established the general proposition that it was within the power of a State to make such a contract binding on the State.

Wilmington Railroad v. *Reid* and *Humphrey* v. *Pegues* were held to come within the general proposition established by *Home of the Friendless* v. *Rouse* and the other cases *supra*. It is to be observed,

that it is in these last two cases only that the opinion of the court recognizes what the general proposition established by those cases is; in these cases the court recognizes that the general proposition is not this: That a state can make such a contract binding on itself; but that it is: That a state legislature, acting under the usual form of State Constitution, can make such a contract binding on the State.

In conclusion, therefore, it is submitted that the distinction here contended for is not concluded by authority; i.e., the distinction between the authority of the legislature of Massachusetts to bind the State of Massachusetts when it is acting as the representative of the public in regard to the property of the public, and its authority to bind the State in regard to the (sovereign) law-making power.

The distinction has never, in case of a legislature acting under a like Constitution, been expressly denied by this Court.

Neither (it is submitted) has it been denied impliedly: —

It is true that on principle this distinction cannot stand with the proposition, that a State legislature, acting under the usual form of State Constitution, can make a contract binding on the State that specified property should be exempt from taxation during a specified term of years.

But it is also true that this Court has never decided that, as matter of principle, that proposition is law. In *Piqua Bank* v. *Knoop*. McLean, J., did not decide that it was: he did not consider the question at all. Taney, C. J., Catron, Daniel, and Campbell, J. J., and (*semble*) Nelson, Grier, and Curtis, J. J., held that it was not.

But on the contrary, taking the reasoning on which the cases establishing that proposition were decided, it is clear that that proposition is an anomaly; if it is an anomaly, it cannot be used to reason from in order to determine the decision of a like case.

III.

Assuming that the principle established, as to the power of taxation, by *New Jersey* v. *Wilson*, and the other cases *supra*, is to be extended to the law-making power, it does not follow that the legislature had authority to make this contract.

1. The legislature can constitutionally exempt property from the operation of a general tax law; consequently the abridgment of the sovereign power, in case of a contract to exempt specified property from taxation for a specified time, is not very extensive.

2. But the legislature cannot exempt one subject from the operation of a criminal law; see *supra* First, III., 1; and consequently a contract, binding on the State, that one subject shall be exempt from the operation of all prohibitory liquor laws, is a contract not to enact any more prohibitory liquor laws at all. To hold such an abridgment of the State's sovereignty to be within the power of the State legislature, is going one step farther than it can be contended the authorities up to this time have gone; and there is certainly no reason for extending the doctrine, that a legislature can abridge the sovereignty of its State.

THIRD POINT.

Mass., St. 1869, *c.* 415, does not violate the 14th Amendment to the Constitution.

I.

Unless St. 1869, *c.* 415, deprives the owner of liquor, acquired before that act was passed, of his property therein, it is clear that it does not violate the 14th amendment; *Bartemeyer v. Iowa*, 18 Wall., 129, at p. 133.

It is, however, conceded that St. 1869, *c.* 415, does prohibit the sale of liquor acquired before it was enacted. *Commonwealth* v. *Logan*, 12 Gray, 136.

Further, it is conceded that if, in prohibiting the sale of such liquor, it deprives the owner of his property in it, the Statute is entirely void; — the clause prohibiting the sale of liquor acquired before, and of that acquired after, is one and the same. — *People* v. *Toynbee*, 13 N.Y. 378, 380, 424–425. *Nolan's case*, 122 Mass., 330.

II.

Mass., St. 1869, *c.* 415, does not, in prohibiting the sale of liquor acquired before it was enacted, deprive the owner of his property therein; and for these reasons: —

First. — 1. As matter of abstract law, the owner of an article has, as against the legislature, no constitutional right to any uses of the article owned which are injurious to the common welfare.

— 2. And this court cannot say that any of the uses prohibited by St. 1869, *c.* 415, are such that they could not be reasonably deemed to be injurious to the common welfare.

Second. — It has been repeatedly decided in the State courts, that such a prohibitory statute as Mass. St., 1869, *c.* 415, does not interfere with vested rights.

Third. — It was admitted in the most extreme case, *Wynehamer* v. *People*, 13 N.Y., 378, that such a statute as Mass. St. 1869, *c.* 415, was constitutional.

FIRST — 1.

As matter of abstract law, the owner of an article has, as against the legislature under the 14th Amendment, no right to those uses of the article owned which are injurious to the common welfare.

As matter of principle this abstract proposition is law: —

A. In discussing this abstract proposition, it is absolutely necessary to keep in mind (1st) the distinction between an article, the use of an article, and the right to use an article; and (2d) that the question is as to the owner's constitutional right to use the article owned as against the legislature; and as against the legislature in case it undertakes to prohibit absolutely the use of the article, and not in a case where the legislature undertakes to transfer the right to use it to another.

B. It is conceded that the 14th Amendment is a restraint upon the State legislatures, and in general terms forbids any legislation which interferes with private property. Miller, J., in *Davidson* v. *New Orleans*, S. C. of U. S., Oct. Term, 1877, 17 Albany Law Journal, 222, 224.

It is also clear, and it is conceded, that the term "property" in the 14th Amendment, means the right to use the article owned to the exclusion of other persons. — That is the legal definition of the term when it is used in other connections; 1 Bl. Com., 138; 2 Bl. Com., 2, 15; Bouvier's Law Dictionary; Burrill's Law Dictionary; Tighlman, C. J., in *Morrison* v. *Semple*, 6 Binney, 94, 98; Spencer, C. J., in *Jackson* v. *Housel*, 17 Johnson, 281, 283; Ruggles, J., in *Stief* v. *Hart*, 1 Comst. 20, 24.

So much is clear and settled; but this leaves entirely untouched the question under consideration, to wit: what uses are, and what uses are not, included in those uses, the right to which constitutes the owner's constitutional "property" in the article owned, as against the legislature.

That question is *res integra*, and must be decided on general rules of construction. None of the definitions of the term property touch this question. The reason is manifest: outside of the United States the legislature is sovereign; the owner's right of property consists in those uses which the legislature chooses to allow (1 Bl. Com., 138); and in no case, that has arisen under any of those State constitutions, which contain this provision of the 14th Amendment, has the question been directly discussed.

It is settled, that the construction of this provision of the 14th Amendment is that of that provision in the State constitutions, of which the 14th Amendment is a re-enactment. Waite, C. J., in *Munn* v. *Illinois*, 94 U. S., 113, 123. Miller, J., in *Davidson* v. *New Orleans*, *ubi supra*.

D. The real question, therefore, is, what did our ancestors mean by the term "property" in this provision of the State constitutions.

a. By the common law a man's property in an article was confined to certain uses; to wit: to those uses which were declared by the judiciary to be not inconsistent with a reasonable enjoyment by others of life, liberty, and property, and with the public health and public morals, i.e., with the common welfare. It is clear that the framers of the Constitution did not use the term property in any larger sense than it had at common law.

b. It is equally clear that the framers of the Constitution did not intend to provide that the owner of an article should have, as against the legislature, a constitutional right to all uses of the article owned, which were not forbidden by the common law.

c. It is therefore manifest that it was the intention of our ancestors, in adopting this constitutional provision, to protect from the action of the legislature the owner's right of using the article owned; and at the same time not to entirely withdraw from the control of the legislature the question, What uses of articles shall be allowed? If that was the intention of the legislature, the question arises:

E. Where was it intended that the line should be drawn? what rights of use are included in the term "property," and what uses are not included, and left within the control of the legislature?

a. In determining the answer to that question, it is to be borne in mind:

1st. That the general purpose of our ancestors in adopting that

part of the Constitution which is usually known as the Declaration of Rights, was this: to secure to themselves as against the legislative, judicial, and executive departments of the government by the organic law, to which those departments of government were each of them subject, the rights which were secured to the people of England as against the king by Magna Charta, and which they, in fact, enjoyed under the rule of parliament. (See Shaw, C. J., in *Commonwealth* v. *Blackington*, 24 Pick., 352, 356; Waite, C. J., in *Munn* v. *Illinois*, 94 U.S., 113, 124; Miller, J., in *Davidson* v. *New Orleans*, *ubi supra*.)

2d. That parliament was in the habit of changing the common law as to what uses of material articles were legal and illegal.

3d. That parliament (though sovereign, and consequently able to confiscate property) was then, as it is now, confessedly, as scrupulous a protector of private property as possible.

b. If these matters are taken into consideration, there can be no doubt as to the answer. The rights of use intended to be protected are those which, according to the practice of parliament, were considered absolute and free of its control; those to which, according to the fundamental principles of property and of government, the owner has an absolute right, but no others. It was not intended to withdraw from the control of the legislature the uses which should be made of articles within its jurisdiction; but it was intended to provide that the legislature, in restraining the uses of articles, should be confined to provisions which were purely legislative in character.

It is true that this answer is intensely general, and that, in casting upon the judiciary the duty of defining "property" according to that answer, the framers of the Constitution cast upon it the duty of defining the abstract principles and limits of government. But can it be said, after carefully considering the matter, that the framers of the Constitution meant any thing more definite? that they meant any thing more or any thing less? that this is not precisely where they meant that the line should be drawn between the uses of articles which were to be left subject to the control of the legislature, and those which were to be inviolable and free of its control?

F. If the above answer is the true one, the definition of "property," in this connection is,—

The right to use an article to the exclusion of others in all ways not injurious to the common welfare.

Of this there can be no doubt.

a. The idea would be ridiculed that parliament considered itself bound to keep within any limits in restraining the uses of articles for the purpose of advancing the common welfare; on the other hand, it is unquestionable, that parliament deemed it proper to restrain the use of all articles, so far as parliament deemed it necessary in order to secure or advance the common welfare, whether the articles were then existing, or were subsequently to be acquired, whether the restraint was absolute or qualified, whether the uses restrained were part, or all of the uses of the article owned.

b. Further, such an unlimited control over the uses of articles for the purpose of securing or advancing the common welfare is within the province of legislative power, according to the abstract principles of property and of government, and all such restraints are purely legislative in character.

Property, i.e., the right to use articles to the exclusion of others, is the offspring of society; it is consequently limited to such uses as are consistent with others' rights and with the welfare of society.

This principle is recognized at common law, as was shown above; but further (a matter which was not shown above), this principle is recognized by the common law to its full extent; if each and every use of an article is injurious to the common welfare, the owner can make no use of the article. Examples of the application of the principle to this extent are to be found: in buildings likely to cause the spread of a conflagration; clothes infected with contagious diseases; lewd pictures (*Du Bost* v. *Beresford*, 2 Camp., 511) and obscene books.

But the machinery of our government is such that this common-law principle as to property cannot be effectually carried out in practice, without aid from the legislature.

The judiciary, in determining what uses are injurious to the common welfare, is to-day confined to precedents. Before the day of precedents (in order to preserve its impersonality, the *sine qua non* of its beneficial existence) it was confined to declaring those uses injurious which were directly so, and which, according to the prevailing sentiment of the community, were confessedly injurious; if there was any doubt as to the character of a certain use, the judi-

ciary could not declare that it was injurious. It is manifest, therefore, that to-day there may be many uses of articles which are injurious to the common welfare but which the judiciary cannot declare to be so.

Again, where it has been established by precedent that the use of an article is injurious to the common welfare, the question whether a specific case comes within the precedents or not, whether in a specific case an article is or is not so used, depends upon so many circumstances, and upon the application of such general principles to the specific facts, that the common law cannot be effectually enforced by the judiciary, nor be applied with any degree of certainty by a private person who desires to know beforehand what his rights are.

It is, therefore, clear, that, in order to carry out in practice the fundamental principles of property and of government (and it is to be noted that these principles are adopted by the common law), it is necessary that the legislature should intervene; it is necessary, in order to make the abstract right which society has, to be free from any injurious use of articles, a reality, that the legislature should (*inter alia*) sometimes declare that uses, which are lawful at common law, are injurious to the common welfare, and consequently for the future shall be prohibited and unlawful.

The only question which remains is as to the time when the legislature is to make the declaration, is to impose restraints on the use of articles: must it be before, or may it be after the article is acquired? The only way in which the legislature can know what uses are and what uses are not injurious to the common welfare, is by experience; in other words, the legislature cannot determine what use of an article is injurious to the common welfare, until large quantities of the article have been acquired and used within its territorial jurisdiction. And as it is entirely impracticable, so far as the operation of a prohibitory or a regulating law is concerned, to distinguish between articles according to the date of their acquisition, it is clear that, if the legislature is to restrain the use of articles at all, it must do so after the articles are acquired as well as before.

In short, it is clear that if the common-law principle of property (which coincides precisely with the character of property in the abstract) is to be effectually carried out in practice, it is absolutely necessary that the legislature should have the power of prohibiting those uses of articles which are injurious to the common welfare, in case of existing articles, as well as in case of articles to be subsequently acquired.

2.

The abstract proposition (that the owner of an article has no constitutional right as against the legislature to those uses of it which are injurious to the common welfare, though not forbidden by the common law), is, as matter of authority, established law: —

A. It was affirmed in a general sort of way by the *ratio decidendi* in,

Fisher v. *McGirr*, 1 Gray, 1, 27.
Blair v. *Forehand*, 100 Mass., 136, 139.
Lowell v. *Boston*, 111 Mass., 454, 467–468.
Oviatt v. *Pond*, 29 Conn., 479, 487.
State v. *Keeran*, 5 R. I., 497, 507–8.
State v. *Allmond*, 2 Houst (Del.), 612, 644.

And was admitted in the *License cases*, 5 Howard, 381, 589, 632.

B. Further, many of the positions taken above, in the argument in support of this abstract proposition, have received judicial sanction:

The origin and general nature of property was fully recognized in *Munn* v. *Illinois*, 94 U. S., 113, 124–125; *Commonwealth* v. *Alger*, 7 Cush., 53, 84–87.

The general power of the legislature to enact regulating laws, and by them to forbid the uses of articles not forbidden by the common law, which are injurious to the common welfare, was, in general terms, recognized in *Commonwealth* v. *Alger ubi supra; Thorpe* v. *R. & B. Railroad Co.*, 27 Vt., 140, and in *Hannibal & St. Joseph Railroad* v. *Husen*, 17 Albany Law Journal, 168. And further, by the case of *Commonwealth* v. *Alger*, *ubi supra*, 95–97, the power of the legislature to prescribe practical tests for determining when an article is used in a way which the common law declares injurious to the common welfare, was definitely established, and the nature and limits of that power, and the occasion for the exercise of it, considered at length.

Lastly, in the following cases it was held that acts which had the effect of depriving the owner of an article of a use of it which he had previously exercised under the law, were legislative in character.

Munn v. *Illinois*, *ubi supra*, 133–134.
Coates v. *New York*, 7 Cowen, 585, 605.
State v. *Noyes*, 30 N. H., 279.
People v. *Hawley*, 3 Mich., 330, 342.

It is admitted that these cases do not definitively establish the correctness of this abstract proposition; in none of them was the distinction recognized which is here contended for, and which with submission is the general underlying principle of all these cases: namely, the distinction between interfering with property and interfering with certain or all uses of the article owned, which are not included in those uses, the right to which constitutes property in that article.

C. But the ground, on which it is maintained that this abstract proposition is *res decisa*, is the fact that regulating laws are constitutional; it is contended that the constitutionality of regulating laws cannot be maintained if this abstract proposition is denied.

a. That regulating laws are constitutional is well settled; it was admitted in:

Munn v. *Illinois*, *ubi supra.*
Bartemeyer v. *Iowa*, *ubi supra.*
Wynehamer v. *People*, *ubi supra.*

Examples are to be found: — In laws prohibiting the removal of sand from beaches (*Commonwealth* v. *Tewksbury*, 11 Met., 55); the building of wharves outside of certain lines (*Commonwealth* v. Alger, *ubi supra*); the interment of bodies within certain limits (*Coates* v. *New York*, *ubi supra*); use of buildings within certain limits as slaughter-houses (*The Slaughter-house cases*, 16 Wall., 36); as markets (*New Orleans* v. *Stafford*, 27 La. Ann., 417); as bowling alleys (*State* v. *Noyes*, *ubi supra*); powder magazines; the use of material articles for manufacturing liquor (*People* v. *Hawley*, *ubi supra*); for gambling; of dogs and cocks for fighting; or horses for racing.

And also in laws prohibiting, unless licensed, the use of existing buildings as inns, theatres, liquor stores (*Commonwealth* v. *Blackington*, 24 Pick., 352), bowling alleys (*State* v. *Noyes*), steam-boiler houses, &c.; the keeping of a dog (*Blair* v. *Forehand*, *ubi supra*).

b. The proposition that regulating laws are constitutional means that the legislature can constitutionally (1) prohibit qualifiedly all uses of an existing article, and (2) prohibit absolutely one of several uses of an existing article.

c. The only ground on which regulating laws can stand under the 14th Amendment, and the State Constitutions, is this abstract

proposition of law, to wit: that the owner's vested rights of property in an article do not include, as against the legislature, the right to those uses which are injurious to the common welfare, though not forbidden by the common law.

It was suggested by Walworth, Ch., in *Vanderbilt* v. *Adams*, 7 Cowen, 349, that the legislature in such cases was limited to making "regulations not lessening the value of the right to use." But that suggestion does not cover half the examples given above: the contrary was expressly pointed out by Shaw, C. J., in *Commonwealth* v. *Alger*, *ubi supra*, 86; and looking to the practice of governments and to the nature of the case it has always been considered to be, and it is indispensable to the maintenance of government that it should be, within the power of the legislature to regulate the use of articles without regard to what the commercial value of the lawful uses of that article was before, and what it was after, the regulating law was enacted.

The constitutionality of regulating laws cannot be maintained on the ground that this constitutional provision forbids "a total deprivation of property only, and does not apply at all in case of an interference with property when the interference is partial only." It is clear that this constitutional provision does forbid a partial deprivation of property. (1) That was settled by the grounds adopted for the decision of *Munn* v. *Illinois;* in *Munn* v. *Illinois* the interference with the use of the elevators was partial only; but it was never supposed that that fact was of itself decisive of the constitutionality of that regulating law. (2) Further, the reasoning employed in *Pumpelly* v. *Green Bay Co.*, 13 Wall., 166, for the construction there adopted of the analogous provision, as to taking property for public uses, is decisive of the point. And, (3) lastly, the result which inevitably follows if the other construction of the Constitution were adopted (to wit, that it allows any partial interference with property) would be decisive of the question. The inevitable result of that construction is that the legislature could, for any reason, no matter how arbitrary or capricious, take away from the owner, and give to the public or to some private person other than the owner, or prohibit absolutely without giving it to another, the right to one or more uses of an article, provided some substantial use was left to the owner.

D. There is one case which is in conflict with this abstract

proposition; that case is *Wynehamer* v. *People*, *ubi supra*; in that case it was held that a statute which prohibited substantially all use of an article, necessarily deprived the owner of his property therein.

That case cannot stand; and for these four reasons: —

1. Pushed to its logical end, that case results in the proposition that the owner of an article has a vested right to use that article in every way, and precisely in those ways, and to that extent, which were allowed by law when the article was first brought into the community. For, if a statute prohibiting all uses of an article, because they are all injurious to the common welfare, is unconstitutional, a statute prohibiting some uses is equally unconstitutional; no distinction can be drawn between a prohibitory statute and a regulating statute. The difference between them arises, not because they are grounded on separate and distinct principles, but because the same principle is applied to different kinds of articles. A statute forbidding one of several uses of an article, because that use is injurious to the common welfare, is a constitutional regulating law, because the constitutional right of property in that article was confined to such uses as were not injurious to the common welfare. Apply the same theory as to the meaning of the term property, to a statute forbidding all uses of an article, because all its uses are injurious to the common welfare, and the result is a prohibitory law which does not deprive the owner of his property in that article, and is not unconstitutional.

The opinion in *Wynehamer* v. *People* maintains that there is a distinction between prohibitory and regulating laws. But the distinction is based on the assumption, that the constitutionality of regulating laws rests on the fact, that a deprivation of property means a total deprivation, and that this constitutional provision does not apply at all in case of a partial interference with property. This assumption runs through the whole opinion; see p. 385, pp. 387–389, and particularly p. 400, where license and excise laws are distinguished on the ground that they are statutes, "producing in their result great injury to private property," but not statutes which "aim at the extinction of any species of property." That assumption is false; see *supra*.

2. The fact that this assumption is false, really disposes of this

case; for that assumption was the whole foundation on which the reasoning was built up, and the decision rested.

3. There are two results of the proposition maintained in *Wynehamer* v. *People*, limited as it was there limited (and it is submitted that there is no principle on which it can be so limited), which are unendurable.

1st. It practically puts an end to prohibitory liquor laws. For there is no jurisdiction in which there is not a large amount of liquor on hand, and it is impracticable to discriminate in a prohibitory law, between liquor previously, and that subsequently acquired. The difficulty cannot be overcome by the suggestion of Bradley, J., in *Bartemeyer* v. *Iowa*, *ubi supra*, p. 136, that the owners of liquor should, immediately on the passage of the law, come forward and claim compensation; because (1st) there is no provision of the Constitution, which authorizes the legislature to make compensation to an owner for being deprived of the use of an article, when its use is destroyed and absolutely prohibited on the ground that it is injurious to the common welfare; the provision, as to taking private property for public uses, has always been confined in its application to cases, where the right to some or all of the lawful uses is transferred to the public; when the owner is deprived of the use that the public may enjoy it as a public improvement; in no case was it ever applied where the owner is deprived of the use of an article on the ground that its use conflicts with the rights of others or with those of the public; *Commonwealth* v. *Alger*, *ubi supra*, 86; *Coates* v. *New York*, *ubi supra*, 606. And, because (2d), assuming that this constitutional provision is to be construed to cover cases of destruction as well as cases of the transfer of the use of an article, if it were held that compensation must be made in case of a prohibitory law, compensation would have to be made in case of a regulating law. *Pumpelly* v. *Green Bay Company*, *ubi supra*, holds that compensation must be made when part of the uses are transferred to another, as well as when all of them are so transferred; and in analogy, it would have to be held that compensation would be due when part of the uses are destroyed, as well as when all of them are destroyed.

2d. It is as matter of theory thoroughly anomalous to hold that the body politic has created any private rights against which it has no power to defend itself. Strong, J., in *Hannibal and St. Joseph Railroad* v. *Husen*, *ubi supra*, 169; A. S. Johnson, J., in *Wynehamer* v.

People, *ubi supra*, 424. Preamble to Mass. Const.; Mass. Const., Part I., Art. VII.

4. The reasoning on which *Wynehamer* v. *People* was decided is in many instances not sound.

(1) It is true that before the statute was passed property in liquor was as sacred and as inviolable as against the legislature under the Constitution as property in any other chattel; but it by no means follows that, because substantially all use of liquor can be constitutionally prohibited, all use of any chattel can be prohibited, and that the doctrine of the inviolability of vested rights is destroyed. Property in liquor and in other chattels are, under the Constitution as against the legislature, one and the same thing, to wit: the right to use the chattel or the liquor to the exclusion of other persons in all ways not injurious to the common welfare; substantially all use of liquor may reasonably be deemed injurious to the common welfare, and, therefore, substantially all use of it may be prohibited without infringing on the owner's property in it; but there are many chattels the use of which cannot be deemed injurious to the common welfare; and consequently in case of those chattels substantially all use of the articles owned cannot be prohibited, without infringing on the owner's constitutional right of property; if in case of those chattels the legislature should prohibit all use of the articles owned, it would be within the power, and it would be the duty, of the judiciary to say, that the uses prohibited were not injurious to the common welfare, and to declare that the statute was, for that reason, unconstitutional as a deprivation of the owner's property therein. It is clearly within the power of the judiciary to do so; *Hannibal and St. Joseph Railroad* v. *Husen*, *ubi supra*; *Lowell* v. *Boston*, *ubi supra*; *Talbot* v. *Hudson*, 16 Gray, 417.

(2) The citation from Blackstone is entirely misconceived. What Blackstone meant when he laid it down that the law of England did "not authorize the least violation of it" (private property) was, that the right of using an article could not be transferred from the owner to the public or a third person; he had immediately before this passage stated that the owner of an article had a right to those uses only, which were allowed by parliament.

(3) It is spoken of as anomaly that the use of an article which to-day is lawful should, by mere legislation, become to-morrow unlawful. But the use prohibited in such a case is one to which the

owner has to-day a mere legal right under the legislature — not a constitutional right as against the legislature. And it is to be observed that precisely the same thing is true in a less degree of regulating laws.

(4) It is stated that when rights have vested under existing laws there is no power in any branch of the government to take them away; and from this premiss the conclusion is reached, that a man cannot be deprived of his right to use an article owned by him except by a judicial investigation, confined to the question whether under a pre-existing rule of conduct the right is lawfully possessed. That is a *non sequitur*. It is true that where rights have vested under existing laws there is no power in any branch of the legislature to take them away; but that means this, and nothing more: that the legal consequences of past acts are always to be determined by the law existing when they happened, and that no law can be passed to change them. It by no means follows from this that the legislature cannot, after an article is acquired, change the law as to what uses of it are lawful; and provide that certain or all uses of it, which were previously lawful, shall for the future be unlawful. A subsequent law cannot make a past action a crime; but it is not necessary that laws limiting and restraining men's actions should be made before they are born. If to-day, A sells to B a cask of liquor, the legal consequences of that act cannot be changed to-morrow; but the legal consequences of that act consist in transferring from A to B the owner's right to use that article to the exclusion of others; what the owner's right of using that article consists in, is a matter which was not determined by the act done; and which remains, as it was, subject to be defined by the legislature; so, if to-day A manufactures a cask of liquor, that act cannot afterwards be made unlawful; but the future use of that liquor may be made unlawful. It seems to have occurred to Comstock, J., that this doctrine could not be supported when, after stating on page 393 that the cause or occasion for depriving the citizen of his supposed rights must be found in the law as it was, he added; "or at least it cannot be created by a legislative act which aims at their destruction."

Finally, it is submitted that when the constitutionality of laws authorizing the destruction of buildings to prevent the spread of a conflagration was explained on the ground that "they are founded upon, and are mere regulations of the common-law right of any person to destroy property in a case of immediate and overwhelming

necessity," the constitutionality of prohibitory laws was conceded; prohibitory laws are merely regulations of the common-law right of society to be free from those uses of articles which are injurious to others and to the public health and public morals.

FIRST. — 2.

If this abstract proposition is law, it is clear that St. 1869, *c.* 415, cannot be declared to be a violation of the 14th Amendment.

This court cannot say, that any of the uses prohibited by St., 1869, *c.* 415, are such, that they could not be reasonably deemed injurious to the common welfare of Massachusetts.

The uses forbidden are all sales of intoxicating liquor except: —

Sales by city or town agents for use in the arts, or for medicinal, chemical, and mechanical purposes.

Sales by druggists to other druggists, physicians, and apothecaries.

Sales to the commissioner and druggists to be resold by them to city and town agents and other druggists.

Sales for sacramental purposes.

Sales by apothecaries for medicinal purposes.

Sales of imported liquor in the original packages, and of cider not to be drunk on the premises.

SECOND.

In the following cases it was held that a prohibitory liquor law to the same effect as Mass. St. 1869, *c.* 415, did not interfere with the vested rights of a person who owned liquor at the time of its passage.

State v. *Allmond*, 2 Houst. (Del.), 612.
State v. *Paul*, 5 R.I., 185.
State v. *Keeran*, ib., 498.
Lincoln v. *Smith*, 27 Vt., 328, affirmed by *Gill* v. *Parker*, 31 Vt., 610.
State v. *Court of Common Pleas &c.*, 7 Vroom, 72.
Shaw, C. J., in *Fisher* v. *McGirr*, 1 Gray 1, 27.
Com. v. *Huber*, 12 Gray, 29.
Com. v. *Logan*, ib., 136.
People v. *Hawley*, 3 Mich., 330.

People v. *Gallagher*, 4 Mich., 244.
Our House No. 2 v. *State*, 4 Green, 172.
Sauto v. *State*, 2 Iowa, 165.
State v. *Bartemeyer*, 31 Iowa, 601.
State v. *Wheeler*, 25 Conn., 290.

And see: —

Stuart and Gookins, J. J., in *Beebe* v. *State*, 6 Ind., 501, 522, 539.
T. A. Johnson and Mitchell, J. J. (dissenting), in *Wynehamer* v. *State*, *ubi supra*, 460, 478.
T. A. Johnson, Mitchell, and Wright, J. J. (dissenting), in *People* v. *Toynbee*, *ubi supra*, 458, 480, 486.
Trumbull, J., in *Jones* v. *People*, 14 Ill., 196, 197.
Parker, C. J., in *Pierce* v. *State*, 13 N. H., 536, 586.

THIRD.

Assuming that the distinction taken in *Wynehamer* v. *People* between regulating laws and prohibitory laws is law, Mass. St., 1869, *c.* 415, is a regulating law. It does not deprive the owner of substantially all use of his liquor. See:

A. S. Johnson, J., in *People* v. *Toynbee*, *ubi supra*, 414.
Selden, J., in *People* v. *Toynbee*, *ubi supra*, 436.
Hubbard, J., in *People* v. *Toynbee*, *ubi supra*, 455.

For the uses which are left to the owner by St. 1869, *c.* 465, see:

Supra, Third Point, First — 2.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 175.

LAUREN A. NOYES, APPELLANT,

vs.

WRIGHT C. HALL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 9, 1875.